DOCKET

No. 07-1209

Title:	James B. Peake, Secretary of Veterans Affairs, Petitioner v. Woodrow F. Sanders
Docketed:	March 21, 2008
Lower Ct:	United States Court of Appeals for the Federal Circuit
Case Nos.:	(06-7001)
Decision Date:	May 16, 2007
Rehearing Denied:	October 23, 2007
	Rule 12.4

Questions Presented

---Date---	--------Proceedings and Orders----------
Jan 11 2008	Application (07A588) to extend the time to file a petition for a writ of certiorari from January 21, 2008 to February 20, 2008, submitted to The Chief Justice.
Jan 14 2008	Application (07A588) granted by The Chief Justice extending the time to file until February 20, 2008.
Feb 8 2008	Application (07A588) to extend further the time to file a petition for a writ of certiorari from February 20, 2008 to March 21, 2008, submitted to The Chief Justice.
Feb 8 2008	Application (07A588) granted by The Chief Justice extending the time to file until March 21, 2008.
Mar 21 2008	Petition for a writ of certiorari filed. (Response due April 21, 2008)
Apr 14 2008	Order extending time to file response to petition to and including May 12, 2008, for all respondents.
May 8 2008	Order further extending time to file response to petition to and including May 16, 2008.
May 12 2008	Brief of respondent Woodrow F. Sanders in opposition filed.
May 16 2008	Brief of respondent Patricia D. Simmons in opposition filed.
May 27 2008	DISTRIBUTED for Conference of June 12, 2008.
May 28 2008	Reply of petitioner James B. Peake, Secretary of Veterans Affairs filed. (Distributed)
Jun 16 2008	Petition GRANTED.
Jul 31 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 21, 2008.
Aug 21 2008	Joint appendix filed. Statement of costs filed.
Aug 21 2008	Brief of petitioner James B. Peake, Secretary of Veterans Affairs filed.
Aug 22 2008	The time within which to file the respondent's brief on the merits is extended to and including October 14, 2008.

Sep 8 2008	SET FOR ARGUMENT Monday, December 8, 2008.
Sep 12 2008	CIRCULATED.
Oct 7 2008	Record recevied from the U.S.C.A. for Veterans Claims. (1 box)
Oct 8 2008	Record received from the U.S.C.A. for the Federal Circuit.
Oct 14 2008	Brief of respondent Patricia D. Simmons filed. (Distributed)
Oct 14 2008	Brief of respondent Woodrow F. Sanders filed. (Distributed)
Oct 21 2008	Motion for divided argument filed by respondents Woodrow F. Sanders and Patricia Simmons.
Oct 21 2008	Brief amicus curiae of Federal Circuit Bar Association filed. (Distributed)
Oct 21 2008	Brief amici curiae of Washington Legal Foundation, et al. filed. (Distributed)
Oct 21 2008	Brief amici curiae of American Legion, et al. filed. (Distributed)
Nov 3 2008	Motion for divided argument filed by respondents GRANTED.
Nov 13 2008	Reply of petitioner James B. Peake, Secretary of Veterans Affairs filed. (Distributed)
Dec 8 2008	Argued. For petitioner: Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent Simmons: Christopher J. Meade, New York, N.Y. For respondent Sanders: Mark R. Lippman, La Jolla, Cal.

PETITION FOR WRIT OF CERTIORARI

88

Supreme Court, U.S.
FILED

07120 9 MAR 2 1 2008

OFFICE OF THE CLERK

No. 07-

In the Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

PATRICIA D. SIMMONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
JEANNE E. DAVIDSON
TODD M. HUGHES
MARTIN F. HOCKEY, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

PAUL J. HUTTER
General Counsel
Department of Veterans Affairs
Washington, D.C. 20420

QUESTION PRESENTED

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, requires the Department of Veterans Affairs (VA) to provide a notice to benefits claimants. Under 38 U.S.C. 7261(b)(2) (Supp. V 2005), review of administrative decisions resolving claims for veterans benefits must "take due account of the rule of prejudicial error." The question presented is:

Whether the court of appeals erred in holding that a failure of the VA to give the notice required by the VCAA must be presumed to be prejudicial.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 7
A. The decisions of the court of appeals conflict with decisions of other courts of appeals interpreting materially identical language in the APA 9
B. There is no basis for creating a unique rule of prejudicial error applicable only to VA adjudications 14
C. The question presented is important and warrants this Court's review 23
Conclusion 25
Appendix A — Court of appeals opinion (Sanders) (May 16, 2007) 1a
Appendix B — Court of appeals order denying rehearing (Sanders) (Oct. 23, 2007) 22a
Appendix C — Court of appeals for veterans claims memorandum decision (Sanders) (Aug. 25, 2005) 24a
Appendix D — Board of veterans' appeals decision (Sanders) (Oct. 1, 2003) 40a
Appendix E — Court of appeals opinion (Simmons) (May 16, 2007) 56a
Appendix F — Court of appeals order denying rehearing (Simmons) (Oct. 24, 2007) 65a
Appendix G — Court of appeals for veterans claims memorandum decision (Simmons) (Dec. 1, 2005) 67a

Table of Contents—Continued: Page

Appendix H — Board of veterans' appeals decision (Simmons) (June 3, 2003) 83a
Appendix I — Statutes 97a

TABLE OF AUTHORITIES

Cases:

Air Canada v. *DOT*, 148 F.3d 1142 (D.C. Cir. 1998) .. 10, 11
American Airlines, Inc. v. *DOT*, 202 F.3d 788 (5th Cir.), cert. denied, 530 U.S. 1274, and 530 U.S. 1284 (2000) 10
American Coke & Coal Chems. Inst. v. *EPA*, 994 F.2d 735 (D.C. Cir. 2006) 5, 10
Bar MK Ranches v. *Yuetter*, 994 F.2d 735 (10th Cir. 1993) 10
Beef Neb., Inc. v. *United States*, 807 F.2d 712 (8th Cir. 1986) 10
Bobbitt v. *Principi*, 17 Vet. App. 547 (2004) 17
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 12
Burkhart v. *WMATA*, 112 F.3d 1207 (D.C. Cir. 1997) ... 20
Campanale & Sons, Inc. v. *Evans*, 311 F.3d 109 (1st Cir. 2002) 10
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) ... 12
Cardelucci, In re, 285 F.3d 1231 (9th Cir. 2002), cert. denied, 537 U.S. 1072 (2002) 12
Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) 12
City of Camden v. *DOL*, 831 F.2d 449 (3d Cir. 1987) 10

Cases–Continued: Page

City of Frankfort v. *FERC*, 678 F.2d 699 (7th Cir. 1982) 10
Community Nutrition Inst. v. *Block*, 749 F.2d 50 (D.C. Cir. 1984) 11
Conway v. *Principi*, 353 F.3d 1369 (Fed. Cir. 2004) 5
eBay Inc. v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006) 14
Elkins v. *United States*, 364 U.S. 206 (1960) 24
FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940) 21
Fiswick v. *United States*, 329 U.S. 211 (1946) 19
Forshey v. *Principi*, 284 F.3d 1335 (Fed. Cir.), cert. denied, 537 U.S. 823 (2002) 17
Friends of Iwo Jima v. *National Capital Planning Comm'n*, 176 F.3d 768 (4th Cir. 1999) 10
Holmes Group, Inc. v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) 12
Intercargo Ins. Co. v. *United States*, 83 F.3d 391 (Fed. Cir. 1996), cert. denied, 519 U.S. 1108 (1997) ... 10
Kotteakos v. *United States*, 328 U.S. 750 (1946) 8, 17, 18, 19
Kroger Co. v. *Regional Airport Auth.*, 286 F.3d 382 (6th Cir. 2002) 10
Livesay v. *Principi*, 15 Vet. App. 165 (2001) 23
Mayfield v. *Nicholson*:
19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006) 4, 7
499 F.3d 1317 (Fed. Cir. 2007) 15
MedImmune, Inc. v. *Genentech, Inc.*, 127 S. Ct. 764 (2007) 14

Cases–Continued: Page

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71 (2006) 12
Morrison Knudsen Corp. v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221 (10th Cir. 1999) 20
Morton v. *West*, 12 Vet. App. 477 (1999), opinion withdrawn, 14 Vet. App. 174 (2000) 15, 16
National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 14
NCTA v. *Gulf Power Co.*, 534 U.S. 327 (2002) 15
NLRB v. *Seine & Line Fisherman's Union*, 374 F.2d 974 (9th Cir.), cert. denied, 389 U.S. 913 (1967) ... 10, 13
O'Neal v. *McAninch*, 513 U.S. 432 (1995) 8, 17, 18, 19, 20, 21
Palmer v. *Hoffman*, 318 U.S. 109 (1943) 13, 18
Phoenix Eng'g & Supply Inc. v. *Universal Elec. Co.*, 104 F.3d 1137 (9th Cir. 1997) 20
Rumsfeld v. *Padilla*, 542 U.S. 426 (2004) 11
Shepard v. *NLRB*, 459 U.S. 344 (1983) 17
Sims v. *Apfel*, 530 U.S. 103 (2000) 17
Thurber v. *Brown*, 5 Vet. App. 119 (1993) 22
United States v. *Fior d'Italia, Inc.*, 536 U.S. 238 (2002) 22
Vazquez-Flores v. *Peake*, No. 05-0355, 2008 WL 239951 (Vet. App. Jan. 30, 2008) 23
Warner-Lambert Co. v. *Apotex Corp.*, 316 F.3d 1348 (Fed. Cir. 2003) 12
Watt v. *Alaska*, 451 U.S. 259 (1981) 15

Cases—Continued: Page

Watts, In re, 354 F.3d 1362 (Fed. Cir. 2004) 21
Wilson v. *Mansfield*, 506 F.3d 1055 (Fed. Cir. 2007) 23

Statutes and regulations:

Administrative Procedure Act, ch. 34, § 10(e), 60 Stat. 244 12
Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832 11
Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 2
§ 3(a), 114 Stat. 2096 15
§ 3(a), 114 Stat. 2096-2097 2
§ 3(a), 114 Stat. 2097 3
Veterans Judicial Review Act, Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4155 11
5 U.S.C. 706 ..... 5, 7, 10, 11, 12, 13
11 U.S.C. 726(a)(5) 12
28 U.S.C. 391 (1940) 18, 19, 20
28 U.S.C. 2111 ..... 18, 20
38 U.S.C. 5100 *et seq.* 2
38 U.S.C. 5103 15
38 U.S.C. 5103(a) 2, 4, 22, 23
38 U.S.C. 5103A 22
38 U.S.C. 5104 22
38 U.S.C. 5104(b) 23
38 U.S.C. 5109A 23
38 U.S.C. 5109B (Supp. V 2005) 24

Statutes and regulations–Continued: Page

38 U.S.C. 7105(a) 23
38 U.S.C. 7105(d) 22
38 U.S.C. 7105(d)(1) 23
38 U.S.C. 7111 23
38 U.S.C. 7112 (Supp. V 2005) 24
38 U.S.C. 7252 3
38 U.S.C. 7261(a)(1) 3
38 U.S.C. 7261(a)(4) (2000 & Supp. V 2005) 3
38 U.S.C. 7261(b)(2) (Supp. V 2005) ..... *passim*
38 U.S.C. 7292 (2000 & Supp. V 2005) 3, 13
38 C.F.R.:
Section 3.159 3
Section 19.9 23
Section 19.26 23
Section 19.29 23
Section 19.37 23
Section 20.1304(c) 23

Miscellaneous:

146 Cong. Rec. (2000):
p. 19,229 16
p. 22,886 16
H.R. Rep. No. 913, 65th Cong., 3d Sess. (1919) 18
H.R. Rep. No. 781, 106th Cong., 2d Sess. (2000) 15, 16
S. Rep. No. 418, 100th Cong., 2d Sess. (1988) 5, 13
S. Rep. No. 397, 106th Cong., 2d Sess. (2000) 16

In the Supreme Court of the United States

No.

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

PATRICIA D. SIMMONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of James B. Peake, M.D., Secretary of Veterans Affairs, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit in these cases.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-21a, 56a-64a) are reported at 487 F.3d 881 and 487 F.3d

892. The decisions of the United States Court of Appeals for Veterans Claims (App., *infra*, 24a-39a, 67a-82a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on May 16, 2007. Petitions for rehearing were denied on October 23 and 24, 2007 (App., *infra*, 22a-23a, 65a-66a). On January 14, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 2008, and on February 8, 2008, the Chief Justice further extended the time to March 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 97a-99a.

STATEMENT

1. Veterans who wish to claim benefits must submit an application to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* Under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, the VA is required to assist veterans in developing claims. Specifically, 38 U.S.C. 5103(a) directs that, "[u]pon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." VCAA § 3(a), 114 Stat. 2096-2097. The notice must also "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Sec-

retary * * * will attempt to obtain on behalf of the claimant." § 3(a), 114 Stat. 2097; see 38 C.F.R. 3.159.

Veterans who are dissatisfied with the administrative resolution of their claims may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court). See 38 U.S.C. 7252. The Veterans Court has authority to "decide all relevant questions of law" and to set aside administrative factual findings that are "clearly erroneous." 38 U.S.C. 7261(a)(1) and (4) (2000 & Supp. V 2005). In reviewing an administrative decision, the Veterans Court must "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2) (Supp. V 2005). Decisions of the Veterans Court are subject to review in certain respects in the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over such cases. See 38 U.S.C. 7292 (2000 & Supp. V 2005).

2. a. Respondent Sanders served in the United States Army from 1942 to 1945. In 1948, he filed a claim with a VA regional office, alleging that an eye condition that he suffered had been caused by an injury sustained during his service. The claim was denied, and Sanders did not appeal. In 1991, Sanders sought to reopen his claim, relying upon statements from two ophthalmologists. The VA reopened the claim and obtained additional evidence, including a report from a VA ophthalmologist, but it ultimately denied the claim. App., *infra*, 2a-5a.

The Board of Veterans' Appeals (Board) affirmed. App., *infra*, 40a-55a. The Board noted that the medical opinions on which Sanders relied were "offered in * * * speculative language and without the benefit of consideration of relevant medical evidence." *Id.* at 54a. Conversely, the VA ophthalmologist had "affirmatively

opine[d] that [Sanders] did not lose right eye vision during service or due to the alleged in-service trauma," but that his eye condition was "most likely infectious in nature." *Id.* at 54a-55a. The Board found her opinion "to be more probative" than those of the other physicians. *Id.* at 55a.

b. Sanders appealed to the Veterans Court, arguing, among other things, that the VA had not complied with the VCAA because it had "failed to provide notice of who would ultimately be responsible for obtaining evidence necessary to substantiate the claim" and had "failed to provide proper notice before the initial unfavorable decision by the agency." App., *infra*, 38a. The court rejected that argument and affirmed the administrative decision. *Id.* at 24a-39a.

The Veterans Court applied the framework for evaluating VCAA-notice errors that it had adopted in *Mayfield* v. *Nicholson*, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006). Under *Mayfield*, a failure to inform a claimant of what evidence is necessary to substantiate his or her claim—an error that the Veterans Court referred to as a "first-element" notice error—was presumptively prejudicial. See *id.* at 122-123. But *Mayfield* held that errors in providing the other elements of the notice required by Section 5103(a) were reversible only if the appellant "identifl[ied], with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain" had appropriate notice been given, and only if the appellant could "assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication." *Id.* at 121.

Because Sanders did not allege a first-element notice error, and because he did not explain how he was prejudiced by the failure of notice, the Veterans Court affirmed the Board's decision denying benefits. App., *infra*, 38a. The court did not determine whether any error had occurred. *Ibid.*

c. The court of appeals reversed. App., *infra*, 1a-21a. The court noted that 38 U.S.C. 7261(b)(2) (Supp. V 2005) requires the Veterans Court to "take due account of the rule of prejudicial error," even when evaluating claims that the VA has erred in giving the notice required by the VCAA. *Id.* at 9a; see *Conway* v. *Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). But the court held that every VCAA-notice error should be "presumed prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication," which it can do "by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." App., *infra*, 14a-15a.

The language of Section 7261(b)(2) is virtually identical to that of 5 U.S.C. 706, the prejudicial-error rule of the Administrative Procedure Act (APA), and the court of appeals acknowledged the existence of legislative history suggesting that Section 7261(b)(2) was intended to incorporate the APA's prejudicial-error rule. App., *infra*, 20a (citing S. Rep. No. 418, 100th Cong., 2d Sess. 61-62 (1988)). Errors respecting notice, moreover, are routinely subject to analysis under the APA's rule of prejudicial error. See, *e.g.*, *American Coke & Coal Chems. Inst.* v. *EPA*, 452 F.3d 930, 939, 941 (D.C. Cir. 2006). The court nevertheless held that "the treatment of prej-

udicial error under the APA is not dispositive," because "[e]ven if Congress had previously intended veterans' claims notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent passage of the VCAA." App., *infra*, 20a-21a. In the view of the court of appeals, "requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

3. a. Respondent Simmons served in the United States Navy from 1978 to 1980. App., *infra*, 57a. Upon her discharge, Simmons filed a claim for disability benefits based on hearing loss in her left ear, but the VA regional office concluded that the degree of hearing loss did not warrant compensation. *Ibid.* In 1998, she asked the VA to reopen her claim and to add a claim for compensation based on hearing loss in her right ear. *Ibid.* The regional office again denied her claim, but the Board remanded, directing the regional office to comply with the notice requirements of the VCAA, which had just gone into effect. *Ibid.* On remand, the regional office again denied the claim. *Ibid.* The Board affirmed, concluding that Simmons's left-ear hearing loss was not sufficiently severe to warrant benefits, see *id.* at 95a, and that there was no "competent evidence of a nexus between the current right ear hearing loss" and Simmons's service, *id.* at 94a.

b. Simmons appealed to the Veterans Court, which reversed the Board's decision. App., *infra*, 67a-82a. The Veterans Court determined that the VA had failed to give Simmons notice "of the evidentiary prerequisites for establishing" her claim, as required by the VCAA. *Id.* at 78a. Because that error was a "first-element" no-

tice error, the court applied a presumption of prejudice, and it imposed on the Secretary the burden of showing "that there was clearly no prejudice" to Simmons as a result of the failure to provide notice of the evidence necessary to substantiate her claim. *Id.* at 80a (quoting *Mayfield*, 19 Vet. App. at 121). The court concluded that the VA had failed to carry its burden because there was no evidence that Simmons had actual knowledge of the evidence needed to substantiate her claim or that a reasonable person would have been aware of what evidence was needed to substantiate the claim. *Id.* at 81a.

c. The Secretary appealed, and court of appeals affirmed. App., *infra*, 56a-64a. The court stated that "[o]ur opinion in *Sanders* resolves this issue" because it establishes that "once the veteran establishes that the VA has committed a VCAA notice error, the Veterans Court should presume that such error was prejudicial." *Id.* at 63a.

4. The court of appeals denied petitions for rehearing en banc. App., *infra*, 22a-23a, 65a-66a.

REASONS FOR GRANTING THE PETITION

Congress directed the Veterans Court to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2) (Supp. V 2005), and it did so by adopting the language of the APA's prejudicial-error rule, 5 U.S.C. 706. The courts of appeals are unanimous in interpreting the APA to impose upon a party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial. At the time Congress enacted Section 7261(b)(2), that interpretation of the APA was already well established, and Congress was fully aware of it. In the decisions below, the Federal Circuit turned that settled construction on

its head by applying a presumption of prejudice whenever the VA fails to give a benefits claimant the notice required by the VCAA. Although the Federal Circuit has exclusive jurisdiction over veterans cases, the rule of law announced below is incompatible with the approach of other courts of appeals interpreting the virtually identical language of the APA.

Nothing in the text or history of Section 7261(b)(2) supports overriding the well-established interpretation of the rule of prejudicial error through the creation of a presumption of prejudice for VCAA-notice errors. Nor, contrary to the reasoning of the court of appeals, is there any basis for divining such a presumption from the text of the VCAA itself. That statute was simply a reaffirmation and clarification of the VA's existing claims-handling procedures, and it did not amend Section 7261(b)(2) in any way. Although the VCAA described the VA's duty to assist claimants in greater detail than prior law, it did not fundamentally alter the existing process for handling claims.

The court of appeals was similarly unjustified in claiming to find support for its decisions in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Those cases concerned the standard of harmless-error review in criminal and habeas corpus proceedings. Such proceedings—in which an individual's liberty is at stake—are far removed from the benefits determinations at issue here and the other types of administrative determinations to which the statutory rule of prejudicial error expressly applies. *Kotteakos* and *O'Neal* are also inapposite because they considered the harmless-error rule in the context of appellate review of a lower court, which involves considerations not present in the context of judicial review of an

administrative agency determination.

The decisions below raise important issues because requiring the VA to establish a lack of prejudice in each case of VCAA-notice error will further strain an already burdened appeals process by generating a large number of remands. Many of those remands will be pointless, because the claimant will not have suffered actual prejudice from the VCAA-notice error (prejudice will have simply been presumed and not disproved), and the VA will reach the same result on remand. Reconsidering those claims will nevertheless divert the attention and resources of an agency that already handles over 800,000 claims each year, delaying the resolution of other, potentially meritorious claims. This Court's review is therefore warranted in order to resolve the conflict in analysis between the decisions below and the decisions of every other court of appeals to construe the rule of prejudicial error.

A. The Decisions Of The Court Of Appeals Conflict With Decisions Of Other Courts Of Appeals Interpreting Materially Identical Language In The APA

Section 7261(b)(2) requires the Veterans Court to "take due account of the rule of prejudicial error." That statute parallels, and draws upon, the APA's prejudicial-error provision, which courts of appeals have uniformly interpreted to impose upon a party seeking to overturn an administrative decision the burden of establishing not only that the agency erred but also that its error was prejudicial. The Federal Circuit erred in disregarding the settled construction of that materially identical statutory language.

1. The prejudicial-error provision of the APA instructs reviewing courts that "due account shall be

taken of the rule of prejudicial error." 5 U.S.C. 706. Every court of appeals to consider the question has interpreted Section 706 to "require[] the party asserting error to demonstrate prejudice from the error." *Air Canada* v. *DOT*, 148 F.3d 1142, 1156 (D.C. Cir. 1998); accord *Campanale & Sons, Inc.* v. *Evans*, 311 F.3d 109, 127 (1st Cir. 2002); *American Airlines, Inc.* v. *DOT*, 202 F.3d 788, 797 (5th Cir.), cert. denied, 530 U.S. 1274, and 530 U.S. 1284 (2000); *Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999); *Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 394 (Fed. Cir. 1996), cert. denied, 519 U.S. 1108 (1997); *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *City of Camden* v. *United States DOL*, 831 F.2d 449, 451-452 (3d Cir. 1987); *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir.), cert. denied, 389 U.S. 913 (1967); see also *Kroger Co.* v. *Regional Airport Auth.*, 286 F.3d 382, 389 (6th Cir. 2002) ("[T]he party challenging the agency's action must show that the action had no rational basis or that it involved a clear and prejudicial violation of applicable statutes or regulations.") (quotation marks omitted); cf. *Beef Neb., Inc.* v. *United States*, 807 F.2d 712, 714 n.1 (8th Cir. 1986); *City of Frankfort* v. *FERC*, 678 F.2d 699, 708 (7th Cir. 1982).

That rule applies no differently when the alleged error involves a failure to provide the requisite notice. See *American Coke & Coal Chems. Inst.* v. *EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006); *Friends of Iwo Jima*, 176 F.3d at 774 ("the party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial"). Indeed, failure to provide notice is a particularly good candidate for a finding of no prejudice, because individuals may already know relevant informa-

tion, or the factors to which notice is directed may have little relevance to a particular proceeding. See *Air Canada*, 148 F.3d at 1156-1157 (finding no prejudice where an agency made "a mid-course change in assignment of the burden of proof" in an administrative proceeding, since petitioners' explanation of what they "would have done differently had they known at the outset of the agency proceedings that they bore the burden of proof" involved presenting evidence on issues that were not "essential to the Department's determination"); see also *Community Nutrition Inst.* v. *Block*, 749 F.2d 50, 58 (D.C. Cir. 1984) (finding no prejudice where an agency relied on studies completed after the close of the comment period, because "appellants do not even suggest that the new studies were defective in any way").

2. The plain language of Section 7261(b)(2) reflects Congress's intent to adopt the rule of prejudicial error as previously established under the APA rather than to create a distinct rule applicable only in the context of appeals of VA benefits decisions. Section 7261(b)(2), which requires the Veterans Court to "take due account of the rule of prejudicial error," was enacted in 1988 (see Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4115, as amended by Pub. L. No. 107-330, § 401(b), 116 Stat. 2832), and is virtually identical to 5 U.S.C. 706, which provides that "due account shall be taken of the rule of prejudicial error." Congress's use of the definite article in the phrase "the rule of prejudicial error" demonstrates that Section 7261(b)(2) refers to a particular existing rule that was established and defined at the time the statute was enacted, and it forecloses any suggestion that Congress intended to establish a new, previously undefined rule. Cf. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004) (The habeas statute's "consistent use of the

definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."); *Warner-Lambert Co.* v. *Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) (Because the definite article "particularizes the subject which it precedes," the statutory phrase "'the use' refers to a specific 'use' rather than a previously undefined 'use.'"); *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir.) (The use of the definite article in a statute calling for "interest at the legal rate" after the filing of a bankruptcy petition indicates "that Congress meant for a single source to be used to calculate post-petition interest.") (quoting 11 U.S.C. 726(a)(5)), cert. denied, 537 U.S. 1072 (2002). In other words, Congress did not merely direct the Veterans Court to disregard harmless error; it directed that court to apply a specific preexisting rule for determining whether an error is prejudicial.

This Court has held that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)); see *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-699 (1979). Section 706 was enacted in 1946, see APA, ch. 324, § 10(e), 60 Stat. 244, and its interpretation was well settled by the time Section 7261(b)(2) was enacted in 1988. "Linguistic consistency" therefore requires the Veterans Court to apply the same rule of prejudicial error that courts apply in proceedings governed by Section 706. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-830

(2002) (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)).

3. If there were any doubt as to whether Section 7261(b)(2) directed the Veterans Court to "take due account of the rule of prejudicial error" in the same manner in which "due account [is] taken of the rule of prejudicial error" under Section 706, that doubt would be eliminated by the legislative history of Section 7261(b)(2). The Senate Committee Report accompanying that provision stated that the statute "would incorporate a reference to the 'rule of prejudicial error' as included in the APA (5 U.S.C. 706)." S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988). Significantly, the report cited the Ninth Circuit's decision in *Seine & Line Fishermen's Union* for the proposition that, under the rule of prejudicial error, "a court should pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter." *Ibid.* (citing 374 F.2d at 981). And in *Seine & Line Fishermen's Union*, the Ninth Circuit had held that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." 374 F.2d at 981 (quoting *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943)). In short, far from contemplating a rule of presumptive reversal, the Committee interpreted the prejudicial-error provision to mean "that a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case." S. Rep. No. 418, *supra*, at 61.

4. Because the Federal Circuit has exclusive jurisdiction to review the decisions of the Veterans Court, see 38 U.S.C. 7292 (2000 & Supp. V 2005), there is no possibility of a circuit conflict arising in the specific con-

text of VCAA-notice errors. But the Federal Circuit's analysis of "the rule of prejudicial error" is incompatible with that employed by every other court of appeals to address the same issue. The Federal Circuit erred by deviating from well-established principles of judicial review of agency action and creating a special rule applicable to appeals within its exclusive jurisdiction. Cf. *MedImmune, Inc.* v. *Genentech, Inc.*, 127 S. Ct. 764, 774 (2007); *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 393-394 (2006). Its decisions create an unjustified anomaly in that they subject the determinations of one federal agency, the VA, to a standard of review different from that applied under the APA to the determinations of every other agency. This Court's review is warranted.

B. There Is No Basis For Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

The court of appeals offered several justifications for departing from long-established principles of prejudicial-error review in the context of VCAA-notice errors. None withstands scrutiny.

1. The court of appeals rejected the traditional understanding of the rule of prejudicial error because, in its view, the VCAA "substantially overhauled the administration of the VA benefits system" and created a "uniquely pro-claimant benefit system." App., *infra*, 21a. Even if that interpretation of the VCAA were correct, it would not justify the court's holding. The VCAA did not amend Section 7261(b)(2), and it said nothing at all about the standard of review of administrative benefits determinations. In light of the canon that "repeals by implication are not favored," *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532

(2007) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)), as well as the principle that specific statutory language prevails over a more general provision, see *NCTA* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002), the VCAA cannot be read to have altered the prejudicial-error rule.

In any event, the court of appeals' interpretation of the VCAA is not correct. Nothing in the text or legislative history of the VCAA supports the court's assessment that the statute fundamentally altered the VA's claims adjudication process. To the contrary, Section 5103 was enacted as part of a provision of the VCAA whose title made clear that it was intended to be a "reaffirmation and clarification" of the VA's existing "duty to assist" claimants. VCAA § 3(a), 114 Stat. 2096. The House Committee on Veterans' Affairs noted that the VCAA would require the VA "to notify the claimant (and the claimant's representative) of any additional information and medical and lay evidence necessary to substantiate the claim," and it explained that "[i]t is the Committee's understanding that the Secretary *currently* undertakes to provide this notification to a claimant." H.R. Rep. No. 781, 106th Cong., 2d Sess. 9 (2000) (emphasis added). In other words, the VCAA was not intended to change the VA's practice; it was merely a "codification of [the notice] requirement" aimed at ensuring "a more uniform practice of notifying a claimant of what evidence he or she must provide." *Ibid.*

In fact, as the court of appeals itself has recognized, the VCAA was enacted not to "overhaul" the VA's adjudication process, but simply to overturn the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477, 485 (1999), opinion withdrawn, 14 Vet. App. 174 (2000). See *Mayfield* v. *Nicholson*, 499 F.3d 1317, 1319 (Fed. Cir. 2007) ("Congress passed the legislation in response to"

the Veterans Court's decision in *Morton*.). *Morton* held that, to the extent certain VA regulations and internal policy procedures required the VA to give assistance in all cases without regard to whether a claim was well grounded, they were unenforceable. See 12 Vet. App. at 485. In the wake of *Morton*, the VA rescinded internal procedures that had instructed VA adjudicators to develop a claim fully before deciding whether it was well grounded. Congress responded by enacting the VCAA, which was intended to be restorative—*viz.*, to return VA to its pre-*Morton* practice of assisting veterans in the development of their claims. See H.R. Rep. No. 781, *supra*, at 8-9; S. Rep. No. 397, 106th Cong., 2d Sess. 21-22 (2000); 146 Cong. Rec. 19,229 (2000) (statement of Sen. Specter) ("[T]he Senate Committee on Veterans' Affairs has worked to craft * * * a legislative solution that returns VA to the pre-Morton status quo ante."); *id.* at 22,886 (2000) (statement of Rep. Stump) ("The bill addresses the Morton versus West court decision and * * * clarifies VA's duty to assist veterans with their claims."). The history of the VCAA provides no support for the court of appeals' conclusion that the VCAA overhauled the VA claims adjudication system or altered the application of the rule of prejudicial error.

2. The court of appeals also stated that requiring an appellant to show prejudice would contravene "Congress's clear desire to create a framework conducive to efficient claim adjudication" and would "create[] a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process." App., *infra*, 16a. That theory rests on a confusion between the VA's administrative claims-adjudication process and the process of judicial review of the VA's decisions. Although the administrative pro-

cess is non-adversarial, judicial review in the Veterans Court is quite different. See *Forshey* v. *Principi*, 284 F.3d 1335, 1355 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). The act of filing an appeal to the Veterans Court "is the first step in an adversarial process challenging the Secretary's decision on benefits" and involves a judicial mechanism that is entirely separate and distinct from the VA administrative process. *Bobbitt* v. *Principi*, 17 Vet. App. 547, 552 (2004). Before the Veterans Court, the Secretary of Veterans Affairs is "a represented appellee in an appellate court adversarial proceeding," and claimants likewise are typically represented by counsel. *Ibid.* Thus, to the extent that the court of appeals below was concerned that adherence to the rule of prejudicial error would require claimants to seek counsel before the Veterans Court, its concern overlooks the nature and typical circumstances of Veterans Court litigation.

As this Court has noted, "there are wide differences between administrative agencies and courts." *Sims* v. *Apfel*, 530 U.S. 103, 110 (2000) (quoting *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983)). The rule of prejudicial error is a limit on the exercise of *judicial* authority, and the fact that the challenged decision was reached through a nonadversarial administrative proceeding does not alter the operation of the rule that a party seeking to invoke the remedial powers of a federal court must demonstrate prejudicial error.

3. The court of appeals also claimed to find support for its holding in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). App., *infra*, 15a. Its reliance on those cases was misplaced.

a. In *Kotteakos*, this Court reviewed a federal criminal conviction for conspiracy, and it held that the district court had erred in permitting a large number of defendants to be tried together for one conspiracy when the evidence established that there were actually several separate conspiracies. 328 U.S. at 755-756. Applying the harmless-error rule of 28 U.S.C. 391 (1940)—now codified, as amended, at 28 U.S.C. 2111—the Court determined that the error was not harmless. See *Kotteakos*, 328 U.S. at 772-777. In reaching that conclusion, the Court stated that, while an appellant normally has "the burden of showing that any technical errors that he may complain of have affected his substantial rights," when the error "is of such character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will * * * rest upon the one who claims under it." *Id.* at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)).

In *O'Neal*, this Court held that in a habeas corpus proceeding, when a court is in "grave doubt" about the likely effect of a constitutional error on the jury's guilty verdict, it should conclude that the error was not harmless. 513 U.S. at 435-436. In so holding, the Court rejected the argument that the appellant's burden of showing prejudice in a civil action applies to habeas proceedings. *Id.* at 440. The Court acknowledged the statement in *Palmer*, 318 U.S. at 116, that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted," but it explained that that language referred to technical errors and thus did not encompass errors that have the "natural effect" of prejudicing substantial rights. *O'Neal*, 513 U.S. at 439-440.

Kotteakos and *O'Neal* are inapplicable here because they involved an individual's loss of liberty, not an administrative adjudication of an entitlement to monetary benefits. The nature of the proceeding in *Kotteakos*—a criminal prosecution—was crucial to the Court's decision in that case. As the Court explained, although Section 391 was applicable to both civil and criminal cases, the statute "grew out of widespread and deep conviction over the general course of appellate review in American criminal causes." 328 U.S. at 759. And the Court observed that the statute "did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability." *Id.* at 763. In fact, just six months after *Kotteakos*, this Court described its decision in that case as involving a review of "the history of [Section 391] and the function it was designed to serve in *criminal* cases." *Fiswick* v. *United States*, 329 U.S. 211, 217-218 (1946) (emphasis added).

Likewise, the Court in *O'Neal* emphasized "the stakes involved" in the proceeding. 513 U.S. at 440. Specifically, it observed that "the errors being considered by a habeas court occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake." *Ibid.* In addition, the Court noted, the error involved was "of constitutional dimension"—another consideration that is not present here. *Id.* at 442.

b. The court of appeals attempted to justify its reliance on *Kotteakos* and *O'Neal* by quoting *O'Neal*'s statement that "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." App., *infra*, 15a (quoting

O'Neal, 513 U.S. at 441). But the Court in *O'Neal* made that observation in the context of 28 U.S.C. 2111 and former Section 391, which, "by its terms, applied to both civil and criminal cases." 513 U.S. at 441. The Court also noted that "the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to § 391 as their statutory source." *Ibid.*

Those provisions are inapplicable in administrative review proceedings like those at issue here. Rather, these cases involve a different statute that uses different language. Compare 38 U.S.C. 7261(b)(2) (Supp. V 2005) (The Veterans Court shall "take due account of the rule of prejudicial error."), with 28 U.S.C. 2111 ("[T]he court shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties."). And unlike 28 U.S.C. 2111, the statute at issue here has no application to criminal proceedings.

Moreover, *O'Neal* considered the appropriate resolution of civil appeals only in cases where there was "grave doubt as to the harmlessness of errors." 513 U.S. at 441. It did not address the situation presented here, in which a party challenging a decision has identified no evidence at all that the outcome would have been different but for the alleged error. In that context, even after *O'Neal*, courts of appeals have held that in "ordinary civil cases," when a reviewing court is "unable, for whatever reasons, to determine whether an error was prejudicial or harmless," then the appellant cannot prevail. *Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999); see *Burkhart* v. *WMATA*, 112 F.3d 1207, 1214-1215 (D.C. Cir. 1997); *Phoenix Eng'g & Supply Inc.* v. *Universal Elec. Co.*, 104 F.3d

1137, 1142 (9th Cir. 1997); see also *In re Watts*, 354 F.3d 1362, 1369 (Fed. Cir. 2004).

c. In relying on *Kotteakos* and *O'Neal*, the court of appeals also overlooked the procedural differences between judicial review of agency action and appellate review of a lower court's decision. Cf. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) ("[T]o assimilate the relation of * * * administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process."). In *O'Neal*, the Court explained that the concept of burdens of proof was not helpful in the context of that case because the matter at issue "involve[d] a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect." 513 U.S. at 436. The same cannot be said of a veterans-benefits case in which the question is whether the VA's notice error precluded a claimant from presenting evidence or argument in support of a claim for veterans benefits or from requesting that the VA obtain the requisite evidence or information.

In these cases, for example, Sanders allegedly failed to receive notice of "who would ultimately be responsible for obtaining evidence necessary to substantiate [his] claim" App., *infra*, 38a, while Simmons allegedly failed to receive notice "of the evidentiary prerequisites for establishing" her claim, *id.* at 78a. Those errors might have prejudiced respondents by making it more difficult for them to provide appropriate evidentiary support for their claims. The only way to determine whether there was prejudice, however, is to conduct an inquiry into whether, in the absence of the notice error, respondents

would have been able to submit additional evidence. The record before the Veterans Court includes the VA's entire file, and respondents are in a far better position than the VA to know what additional evidence they might have submitted. The decisions of the court of appeals are thus inconsistent with the general principle that burdens are appropriately placed on the party who is more likely to have knowledge of the relevant facts. See *United States* v. *Fior d'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002).

Further, in contrast to *Kotteakos*, in which the court of appeals provided the first opportunity to correct a trial-court error, the non-adversarial proceedings before VA regional offices and the Board offer many opportunities to correct any errors that might occur in the initial notice provided under Section 5103(a). See *Thurber* v. *Brown*, 5 Vet. App. 119, 123 (1993) ("VA's nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process."); see also 38 U.S.C. 5104, 7105(d). For example, should the VA fail to provide sufficient notice under Section 5103(a), its general duty to provide assistance under 38 U.S.C. 5103A—including by helping to develop the record for review—might well lead it to correct the deficient initial notice, since the claimant's involvement in the VA's development efforts would provide opportunities to submit any information or evidence necessary to substantiate a claim.

In fact, opportunities to correct an initial notice error continue beyond the initial decision by the VA regional office in a case. Not only must that initial decision contain a written statement of the reasons and bases for the decision, which informs the claimant of the evidence or

information that may have led to the denial of benefits, but should the claimant disagree with the decision, the regional office may take additional development or review action. See 38 U.S.C. 5104(b). That action may include consideration of any additional evidence provided by the claimant before transmitting the record to the Board for a review upon appeal. See 38 U.S.C. 7105(d)(1); 38 C.F.R. 19.26, 19.29, 19.37. Even after the appeal is transferred to the Board, the claimant may introduce additional evidence, either documentary or testimonial. See 38 U.S.C. 7105(a); 38 C.F.R. 19.9, 20.1304(c). Those procedures reduce the potential for prejudice resulting from any isolated notice error, and they make a presumption of prejudice all the more unwarranted. The decisions below ignored those features of the VA claims system.

C. The Question Presented Is Important And Warrants This Court's Review

The decisions of the court of appeals will have a significant adverse effect on the VA adjudication process. The VA receives more than 800,000 benefits claims per year, and it must provide notice under Section 5103(a) with respect to all claims except those based on clear and unmistakable error. See *Livesay* v. *Principi*, 15 Vet. App. 165, 179 (2001) (en banc); 38 U.S.C. 5109A, 7111. It is often difficult to determine precisely what notice is required under the VCAA in any given case, because the required notice varies depending on the specific claim asserted by the veteran. See *Wilson* v. *Mansfield*, 506 F.3d 1055, 1062 (Fed. Cir. 2007) (notice "necessarily must be tailored to the specific nature of the veteran's claim"); see also *Vazquez-Flores* v. *Peake*, No. 05-0355, 2008 WL 239951, at *3 (Vet. App. Jan. 30,

2008). As a result, there will be many cases in which claimants can plausibly assert that a VCAA-notice error occurred. And in a significant fraction of those cases, the allocation of the burden of showing prejudice will be outcome-determinative.

Under the decisions of the court of appeals, the VA can prevail only by demonstrating that the claimant was not prejudiced. It is likely that the VA will be unable to meet that burden of proof in many cases—even those in which there was not, in fact, any prejudice as a result of the VCAA error. For example, the court of appeals held that the VA could overcome the presumption of prejudice by showing that "any defect was cured by actual knowledge on the part of the claimant." App., *infra*, 14a-15a. But while the claimant is presumably aware of whether he or she had actual knowledge—and could easily deny having actual knowledge if such a denial is warranted—the VA is unlikely to have any evidence bearing on the question. Similarly, it might be true that "a benefit could not possibly have been awarded" in a particular case, *id.* at 63a, because there is no evidence supporting the claim. That fact would be known to the claimant, but the VA will likely be unable to demonstrate it. See *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) ("As a practical matter it is never easy to prove a negative.").

The result of the decisions below will therefore be a large number of remands, in each of which the VA will be required to provide an additional notice to the appellant, await a response from the appellant, and then readjudicate the remanded claim. To make matters worse, the VA has a statutory obligation to provide expedited treatment to remanded claims. See 38 U.S.C. 5109B, 7112 (Supp. V 2005). Many of those remands will

be pointless because, for reasons known to the claimant but not the VA, the notice error will have made no difference to the outcome of the proceeding. Those remands will divert resources from the adjudication of meritorious claims, placing further strain on the VA's already burdened claims-administration process and delaying awards of benefits to deserving veterans. Those results are not justified by the language of Section 7261(b)(2) or the VCAA, and warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

JEANNE E. DAVIDSON
TODD M. HUGHES
MARTIN F. HOCKEY, JR.
Attorneys

PAUL J. HUTTER
General Counsel
Department of Veterans Affairs

MARCH 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7001

WOODROW F. SANDERS, CLAIMANT-APPELLANT

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLEE

May 16, 2007

Before NEWMAN, MAYER, and PROST, Circuit Judges.

PROST, Circuit Judge.

Woodrow F. Sanders appeals an August 25, 2005, decision by the United States Court of Appeals for Veterans Claims ("Veterans Court") that affirmed a decision by the Board of Veterans' Appeals ("Board") denying Mr. Sanders's claim for service connection for choroidoretinitis of his right eye. *Sanders v. Nicholson*, 20 Vet. App. 143 (2005). Because the Veterans Court incorrectly required Mr. Sanders to establish that an error in a notice the Department of Veterans Affairs ("VA") is required to give claimants was prejudicial, we reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

Mr. Sanders served in the United States Army from May 1942 to September 1945. Although his service medical records do not indicate that he suffered an eye trauma or abnormality and no eye abnormalities were recorded in his separation medical examination, Mr. Sanders asserts that on September 12, 1944, while serving in France, a bazooka exploded near him, burning the right side of his face. In December 1948, Mr. Sanders was diagnosed with chronic, right-eye choroidoretinitis, an inflammation of the choroids and retina. Believing his choroidoretinitis was caused by his injury in 1944, Mr. Sanders submitted a claim for service connection for a right-eye disability to the VA. The VA regional office ("VARO") denied his claim in February 1949.

Approximately forty years later, Mr. Sanders filed a statement attempting to reopen his claim for service connection for his choroidoretinitis. In support of his claim, Mr. Sanders submitted a statement from a VA ophthalmologist, dated December 1992, and a statement from a private ophthalmologist, dated September 1993. The VA ophthalmologist reported that Mr. Sanders stated that he was injured in a bridge explosion, rather than a bazooka explosion, and that he had experienced vision loss in his right eye ever since. The VA ophthalmologist went on to diagnose right and left macular chorioretinal scars and stated that "[i]t is not inconceivable that these macular and retinal lesions in each [eye] and particularly the right could have occurred secondary to trauma."

Mr. Sanders's private ophthalmologist also reported that Mr. Sanders indicated that his injury occurred during a bridge explosion and that he had experienced

vision loss in his right eye since then. The ophthalmologist diagnosed large chorioretinal scars in both eyes and opined that "[t]his type of macular injury in his right eye can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II."

Mr. Sanders later stated that both the VA ophthalmologist and his private ophthalmologist were incorrect in reporting that his eye injury occurred during a bridge explosion. Instead, Mr. Sanders reiterated that his injury occurred when the right side of his face was burned by a bazooka explosion. According to Mr. Sanders, this injury went unreported because there were no medics to whom he could report his injury and because most of his fellow soldiers were wounded or killed. Nonetheless, in July 1994 the VARO found Mr. Sanders had failed to present new and material evidence to reopen his claim. Mr. Sanders appealed to the Board, but the Board denied his claim for service connection in a decision dated November 27, 1998. In January 1999, however, the Veterans Court remanded Mr. Sanders's case for further development and adjudication.

In June 2000, the Board found that new and material evidence had been presented to reopen Mr. Sanders's claim for service connection and remanded Mr. Sanders's claim for a VA ophthalmologic examination to determine the etiology of his right-eye condition.

In December 2000, Mr. Sanders had a comprehensive eye examination by a VA optometrist. The optometrist diagnosed decreased vision in the right eye due to a macular scar and a small chorioretinal scar in the left eye, but stated that, based on the fact that Mr. Sanders's visual acuity in the right eye was 20/20 on May 15,

1942, and 20/25 on September 25, 1945, when he was discharged from the Army, it is unlikely that the decrease in vision was related to Mr. Sanders's September 1944 trauma. The optometrist also noted that there was no documented evidence of reduced vision until 1948. According to the optometrist, "[i]t is certainly possible for there to have been damage to the retina in 1944 that then hemorrhaged in 1948, . . . but there are no other signs of ocular trauma." The optometrist concluded that "[t]he chorioretinitis is most likely infectious in nature, although the etiology at this point is impossible to determine." Although he noted it was possible Mr. Sanders contracted some infection during his military service, the optometrist stated that "there is no way to prove this either."

In August 2001, Mr. Sanders was also examined by another VA ophthalmologist, who diagnosed dense macular scarring of the right eye and early macular degeneration of the left eye. The ophthalmologist stated that Mr. Sanders's decreased vision was consistent with these clinical findings, but that the etiology of Mr. Sanders's macular scar "is more difficult to ascertain." According to the ophthalmologist, "[i]f [Mr. Sanders's] vision had been normal in the right eye prior to the reported injury, then it is possible that the macular scar could be related to the injury." The ophthalmologist further stated that "[d]ue to the fact that [Mr. Sanders] does have the additional punched out chorioretinal scars in both eyes, the possibility of [an infection] as the etiology of the macular scar could also be entertained."

The VARO issued Supplemental Statements of the Case in 2001 and 2002 discussing this additional medical evidence. The VARO also sent Mr. Sanders a letter

stating that it had all the information it needed to decide his claim, but that he could submit any additional evidence he wanted considered.

In October 2003, the Board denied Mr. Sanders's claim for service connection for his right-eye choroidoretinitis. The Board found that the opinion of the VA optometrist was more probative on the issue of whether Mr. Sanders's choroidoretinitis was service-related and concluded that the preponderance of the evidence weighed against the claim. Mr. Sanders appealed to the Veterans Court.

On appeal to the Veterans Court, Mr. Sanders argued that the VA failed to provide notice as to who was responsible for obtaining the evidence necessary to substantiate his claim, as required by the notice provision of the Veterans Claims Assistance Act of 2000 ("VCAA"), 38 U.S.C. § 5103(a), and failed to provide this notice prior to the initial denial of his claim.

In a decision dated August 25, 2005, the Veterans Court found that there was a plausible basis in the record for the Board's decision denying service connection. The Veterans Court also found that Mr. Sanders did not allege any specific prejudice resulting from the VA's alleged failure to notify him about who would ultimately be responsible for obtaining the evidence necessary to substantiate his claim, and to provide notice before the initial unfavorable decision by the VARO. Because Mr. Sanders did not meet the burden of showing how such errors affected the fairness of the adjudication, the Veterans Court stated that it need not consider whether any error occurred. Mr. Sanders appeals to this court. We have jurisdiction over appeals from the Veterans Court pursuant to 38 U.S.C. § 7292.

II. DISCUSSION

A. Standard of Review

In reviewing a Veterans Court decision, this court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). We must set aside any regulation or interpretation thereof, "other than a determination as to a factual matter," relied upon by the Veterans Court that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." *Id.* We review questions of statutory interpretation de novo. *Summers v. Gober*, 225 F.3d 1293, 1295 (Fed. Cir. 2000). Except to the extent that an appeal presents a constitutional issue, this court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

B. History of the VCAA

At the center of Mr. Sanders's appeal are the notice requirements of the VCAA. The VCAA was enacted in November 2000 to ensure that the VA assisted veterans claiming VA benefits. The legislation was passed in response to concerns expressed by veterans, veterans service organizations, and Congress over a July 1999 decision of the Veterans Court, *Morton v. West*, 12 Vet. App. 477 (1999), which held that the VA did not have a duty to assist veterans in developing their claims unless the claims were "well-grounded." Put another way, prior to the VCAA, the VA only had to assist in the full de-

velopment of a veteran's claim if the veteran first provided enough information for the VA to determine that the claim was plausible. The VCAA eliminated this well-grounded-claim requirement. *See* 146 Cong. Rec. H9913-14 (Oct. 17, 2000) (Explanatory Statement by the House and Senate Committees on Veterans' Affairs). Instead, Congress noted that under the VA's "claimant friendly" and "non-adversarial" adjudicative system, the VA "must provide a substantial amount of assistance to a [claimant] seeking benefits." 146 Cong. Rec. at H9913 (citations omitted).

Under the legal framework of the VCAA, there is generally no prerequisite to receiving VA assistance; the VA is simply required to assist a claimant at the time that claimant files a claim for benefits. *See* 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c) (2003). As part of this assistance, the VA is required to notify claimants of what they must do to substantiate their claims. 38 U.S.C. § 5103(a). If the VA denies a claim, it must provide the claimant with a statement of the reasons for the decision and a summary of the evidence considered. 38 U.S.C. § 5104(b). If a claimant files a notice of disagreement, the VA must issue a statement of the case summarizing the reasons for the VA's decision on each issue, the evidence considered, and the relevant statutes and regulations. 38 U.S.C. § 7105(d)(1). All claimants are entitled to appear at their hearings for the purpose of presenting evidence, and VA personnel conducting hearings are instructed to "suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 38 C.F.R. § 3.103(c)(2).

As mentioned above, Mr. Sanders's appeal focuses on the notice requirements of the VCAA. These notice requirements are contained within 38 U.S.C. § 5103(a), which states:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

The purpose of § 5103(a) notification "is to ensure that the claimant's case is presented to the initial decisionmaker with whatever support is available, and to ensure that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant" prior to the initial adjudication of his claim. *Mayfield v. Nicholson*, 444 F.3d 1328, 1333-34 (Fed. Cir. 2006) ("*Mayfield II*"). Moreover, the VA's duty to notify cannot be satisfied "by various post-decisional communications from which a claimant might have been able to infer what evidence the VA found lacking in the claimant's presentation," as such post-decisional notices do not contain the same content or serve the same purpose as § 5103(a) notification. *Id.*; *see also Pelegrini v. Principi*, 18 Vet. App. 112, 120 (2004).

The statutory notice requirement of § 5103(a) is implemented in 38 C.F.R. § 3.159(b)(1), which provides, in pertinent part:

> When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim.

Accordingly, the notice required by the VCAA can be divided into four separate elements: (1) notice of what information or evidence is necessary to substantiate the claim; (2) notice of what subset of the necessary information or evidence, if any, that the claimant is to provide; (3) notice of what subset of the necessary information or evidence, if any, that the VA will attempt to obtain; and (4) a general notification that the claimant may submit any other evidence he or she has in his or her possession that may be relevant to the claim. Errors with regard to these elements are referred to as first-element, second-element, third-element, and fourth-element notice errors, respectively.

This court has previously held that such VCAA notice errors are reviewed under a prejudicial error rule. *Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). This is consistent with 38 U.S.C. § 7261(b)(2), which states that the Veterans Court shall "take due account of the rule of prejudicial error" when reviewing the re-

cord of proceedings before the Secretary and the Board of Veterans' Appeals. The court in *Conway*, however, did not express an opinion as to what it means for the Veterans Court to "take due account" of the rule, nor did it define what constitutes prejudicial error. *Conway*, 353 F.3d at 1375.

Lacking specific guidance from this court, the Veterans Court took it upon itself to address how to apply the rule of prejudicial error in *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005) ("*Mayfield I*"), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006). As an initial matter, the Veterans Court in *Mayfield I* held that an appellant asserting a VCAA notice error bears the burden of convincing the court that a notice error has, indeed, been committed, by referring to specific deficiencies in the documents in the record on appeal, including any documents that may have been relied on as satisfying the notice requirements of § 5103(a). *Id.* at 111.

Next, the court addressed what was meant by prejudicial error. *Id.* at 112-16. After analyzing Supreme Court and Federal Circuit precedent, as well as interpretations of the prejudicial error rule under the Administrative Procedure Act ("APA"),[1] the court concluded that "an error is prejudicial if it affects the 'substantial rights' of the parties in terms of 'the essential fairness of the [adjudication].' " *Id.* at 115 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). As stated by the court, this did not require an outcome to have been dif-

---

[1] Similar to the VCAA, the APA requires federal courts to take "due account . . . of the rule of prejudicial error" when reviewing agency administrative action. 5 U.S.C. § 706.

ferent to have been prejudicial. *Id.*; *see also Kotteakos v. United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence."). That said, a demonstration that the outcome would not have been different in the absence of the error would demonstrate that there was no prejudice. *Mayfield I*, 19 Vet. App. at 115.

According to *Mayfield I*, Congress, in § 7261(b)(2), provided the Veterans Court "with considerable discretion in determining what burdens should be carried by the parties regarding [its] taking due account of the prejudicial-error rule." *Id.* at 117. After analyzing Supreme Court precedent in other contexts, *see id.* at 117-20, the court concluded that

> in the section 5103(a) notice context an appellant generally must identify, with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain (e.g., a nexus medical opinion) had the Secretary fulfilled his notice obligations; further, an appellant must also assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication.

Id. at 121. However, if the asserted error is found to exist and to be of the type that has the "natural effect" of producing prejudice, an appellant need not have pled prejudice. *Id.* Instead, "it is the Secretary's burden to demonstrate lack of prejudice in terms of the fairness of the adjudication." *Id.* To do this, the Secretary is re-

quired to persuade the court that the purpose of the notice was not frustrated—e.g., by demonstrating: (1) that any defect in notice was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not possibly have been awarded as a matter of law. *Id.* With this in mind, the Veterans Court defined the roles of the claimant and the Secretary in connection with the court's taking due care of the prejudicial error rule in the context of the various types of notice element and timing errors.

With respect to the first notice element, i.e., notice regarding the information and evidence necessary to substantiate the claim, the court held that the natural effect of such an error would "constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the appellant] from participating effectively in the processing of her claim," defeating the very purpose of § 5103(a) notice. *Id.* at 122. Accordingly, the court held that such a first-element error was presumed prejudicial, and that the VA had the burden of demonstrating that the appellant was not prejudiced by the notice error. *Id.*

With respect to the second and third notice elements, i.e., notice regarding which portion of the information and evidence necessary to substantiate the claim, if any, is to be provided by the claimant and which portion, if any, the Secretary will attempt to obtain on behalf of the claimant, the court noted that "the assertion of [such an] error, by itself, does not have the natural effect of producing prejudice because this asserted error did not preclude the appellant from effectively participating in

the processing of [the] claim." *Id.* Instead, "prejudice can arise from such an asserted error only if [the appellant] failed to submit evidence because [he or] she was not advised to do so, or if the Secretary failed to seek to obtain evidence that he should have obtained." *Id.* Accordingly, with respect to second and third notice elements, the Veterans Court placed the burden of establishing prejudice on the claimant, requiring the claimant to identify: (1) how the notice was defective; (2) what evidence the appellant would have provided or requested the Secretary to obtain had the Secretary fulfilled his notice obligations; and (3) how the lack of that evidence affected the essential fairness of the adjudication. *Id.* at 121.

With respect to the fourth notice element, i.e., that the notice "request that the claimant provide any evidence in the claimant's possession that pertains to the claim," 38 C.F.R. § 3.159(b)(1), the court also placed the burden of showing prejudice on the claimant. *Id.* at 122-23. According to the court, "[p]rejudice would exist only if the claimant had evidence in [his or] her possession, not previously submitted, that is, of the type that should be considered by the Secretary in assessing her claim." *Id.* at 122. Moreover, whether or not claimant had such evidence "is a matter within [his or] her knowledge and certainly outside the Secretary's." *Id.* at 123. Accordingly, the court thought the burden to prove prejudice was properly placed on the claimant, rather than on the Secretary. This required the claimant to identify: (1) how the notice was defective, (2) what evidence the appellant would have provided had the Secretary fulfilled his notice obligations, and (3) how the lack of that evidence affected the essential fairness of the adjudication. *Id.* at 121.

Finally, with regard to timing errors, the court noted that such errors "do[ ] not have the natural effect of producing prejudice and that, therefore, prejudice must be pled as to it." *Id.* at 123.

C. Prejudicial Error Rule in the VCAA Context

On appeal, Mr. Sanders contends that the Veterans Court's opinion in *Mayfield I*, requiring a claimant to show prejudice as the result of an untimely or inadequate VCAA notice with respect to second-, third-, and fourth-element notice errors, misinterprets 38 U.S.C. § 5103(a) and 38 U.S.C. § 7261(b)(2). Instead, Mr. Sanders argues that all VCAA notice violations should be presumed prejudicial, as is the case with first-element notice errors under *Mayfield I*.[2] We agree.

The requirement that a claimant demonstrate prejudice as a result of a VCAA notice error is at odds with the very purpose behind the passage of the VCAA. Instead, we hold that the VCAA notice errors should be presumed prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication. To do this, the VA must persuade the reviewing court that the purpose of the notice was not frustrated, e.g., by demonstrating: (1) that any

---

[2] Although Mr. Sanders's brief argues that VCAA notice errors should be deemed per se prejudicial, the brief also acknowledges an exception to this rule "when, under any conceivable factual scenario, further development of the record would not support an award of benefits." (Appellant's Br. 18 n.9.) As such, Mr. Sanders does not advocate a true "per se prejudicial" rule. Instead, at oral argument counsel for Mr. Sanders clarified his position as advocating a presumption of prejudice for all VCAA notice errors, similar to the presumption applied to first-element notice errors under *Mayfield I*.

defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law. In other words, we conclude that the rule the Veterans Court applied to first-element notice errors should also apply to second-, third- and forth-element notice errors.

Although the Supreme Court in *Palmer v. Hoffman*, 318 U.S. 109, 116, 63 S. Ct. 477, 87 L. Ed. 645 (1943) held that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted," the Supreme Court has also held that "the burden of showing that any technical errors . . . affected his substantial rights" does not always fall to the party seeking a new trial. *Kotteakos*, 328 U.S. at 760, 66 S. Ct. 1239. Instead, "[i]f the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, [then] the burden of sustaining a verdict will . . . rest upon the one who claims under it." *Id.* The fact that *Kotteakos* involved a criminal matter is immaterial, as "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *O'Neal v. McAninch*, 513 U.S. 432, 441, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995).

In *Mayfield I*, the Veterans Court acknowledged that "[s]ection 5103(a) assumes a fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system . . . by affording a claimant a meaningful opportunity to participate effectively in the pro-

cessing of his or her claim." 19 Vet. App. at 120-21 (citations omitted); *see also id.* at 120 ("Nothing in the VCAA's legislative history, or in the VA's August 2001 regulations or their regulatory history, suggests that the VCAA and its implementing regulations were not intended to bestow upon an appellant a substantial right by way of amended section 5103(a) notice."). The Veterans Court, however, erred by not giving sufficient weight to the importance of claimant participation to the VA's uniquely pro-claimant benefits system.

Moreover, despite its proffered justifications, the Veterans Court erred by parsing the various elements of the notice required by § 5103(a) and finding certain elements of the required notice more substantial than others. As stated by the Supreme Court, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339, 49 S. Ct. 336, 73 L. Ed. 722 (1929). The Veterans Court, however, took Congress's clear desire to create a framework conducive to efficient claim adjudication and instead created a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process and assure him or herself of a fair adjudication. For example, the system articulated by the Veterans Court requires a claimant, simply in order to rectify the VA's failure to comply with its statutorily mandated responsibilities, to bear the burden of (1) figuring out what it means to "affect the essential fairness of the adjudication," and persuading the court in an adversarial judicial proceeding that the essential fairness of the underlying adjudication was indeed affected. Given Congress's intent to not only involve but assist the claimant in the processing of his or her claim, and given that the

rule of prejudicial error only arises when the VA has undisputedly failed to follow statutory requirements, the system created by *Mayfield I* cannot be consistent with what Congress envisioned when passing the VCAA.

Additionally, the Veterans Court compounded this error by discounting the importance of several of the various notice elements when considering whether the various VCAA notice errors had the natural effect of prejudicing the appellant. With respect to first-element notice errors, we agree with the Veterans Court that the natural effect of such an error would "constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the appellant] from participating effectively in the processing of her claim," defeating the very purpose of § 5103(a) notice. *Mayfield I*, 19 Vet. App. at 122. However, we fail to see how second-, third-, and fourth-element notice errors are so materially different from first-element notice errors as to compel substantially different treatment.

With respect to second- and third-element notice errors, the Veterans Court incorrectly concluded that such an error "did not preclude the appellant from effectively participating in the processing of [the] claim." *Id.* Instead, the Veterans Court stated that "prejudice can arise . . . only if [the appellant] failed to submit evidence because [he or] she was not advised to do so, or if the Secretary failed to seek to obtain evidence that he should have obtained." *Id.* This fact, however, does not dictate placing the burden of establishing prejudice on the claimant. In passing the VCAA, Congress clearly viewed the claimant's participation as essential to processing his or her claim for VA benefits, and believed that the claimant should be notified which evidence he or

she was responsible for providing and which evidence the government was responsible for providing. If Congress felt that such notice elements were not necessary to allow the claimant to effectively participate in the processing of his or her claim, then why would it have required them as part of the notice pursuant to § 5103(a)? By presuming these notice errors were not prejudicial, the Veterans Court essentially excused the VA's failure to satisfy its statutory obligations—ones which Congress explicitly required in order to allow the claimant to effectively participate in the processing of his or her claim—without a showing that the defect had not frustrated the very purpose of the notice. This was error.

The Veterans Court also incorrectly placed the burden of establishing prejudice on the appellant with respect to fourth-element notice errors. Although the Veterans Court correctly stated that "[p]rejudice would exist only if the claimant had evidence in [his or] her possession, not previously submitted, that is, of the type that should be considered by the Secretary in assessing her claim," *id.*, this fact does not dictate placing the burden of establishing prejudice on the appellant. And although the Veterans Court did not base its allocation of the burden on that fact that whether or not the claimant had such evidence "is a matter within [his or] her knowledge and certainly outside the Secretary's," *id.* at 123, this fact only highlights the importance of providing proper notice to the claimant.

Finally, with regard to timing errors, the Veterans Court also incorrectly placed the burden of establishing prejudice on the appellant. As this court pointed out, the purpose of § 5103(a) notification is to ensure that the

claimant's case is presented with all available support prior to the initial adjudication of his claim. *Mayfield II*, 444 F.3d at 1333-34. Post-decisional notices cannot satisfy the VA's § 5103(a) notification duty. *Id.* By assuming timing errors are not prejudicial, however, the Veterans Court essentially held the opposite—that post-decisional notices can be assumed to have satisfied this duty. It is not for the Veterans Court, nor for this court for that matter, to disregard Congress's intended purpose. Accordingly, presuming such timing errors were not prejudicial was error on the part of the Veterans Court.

In light of the above discussion, we hold that any error in a VCAA notice should be presumed prejudicial. The VA has the burden of rebutting this presumption. That said, this opinion does not displace the rule that the claimant bears the burden of demonstrating error in the VCAA notice, *see* U.S. Vet. App. R. 28(a), nor does it change the rule that reversal requires the essential fairness of the adjudication to have been affected. This opinion merely clarifies that all VCAA notice errors are presumed prejudicial and that the VA has the burden of rebutting this presumption.

In announcing this rule, we are mindful of the Supreme Court's admonition that only certain "structural errors undermining the fairness of a criminal proceeding as a whole" warrant reversal without regard to the mistake's effect upon the proceeding, *United States v. Benitez*, 542 U.S. 74, 81, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004). A presumption of prejudice does not require reversal in all instances of VCAA notice error. Only in situations where the VA cannot rebut the presumption would reversal be warranted.

Moreover, the presumption of prejudice does not defeat the purpose of the rule of prejudicial error, i.e., "to avoid wasteful proceedings on remand where there is no reason to believe a different result would have been obtained had the error not occurred." *In re Watts*, 354 F.3d 1362, 1369 (Fed. Cir. 2004). Instead, it merely shifts the burden of rebutting this presumption to the VA in light of the uniquely pro-claimant benefit system created by the VCAA.

We are also mindful that when § 7261(b)(2) was originally enacted—as 38 U.S.C. § 4061(b)—the Senate Committee on Veterans Affairs issued a report that stated its scope-of-review provisions "would incorporate a reference to the 'rule of prejudicial error' as included in the [APA]," and that this would require a court to "pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter." S. Rep. No. 100-481, at 62 (1988). However, the treatment of prejudicial error under the APA is not dispositive, as even the Veterans Court recognized. In *Mayfield I*, after considering the APA, the Veterans Court still noted that § 7261(b)(2) left it with "considerable latitude as to how to 'take due account'" of the rule of prejudicial error. 19 Vet. App. at 114. Had the Veterans Court felt constrained by the interpretation of the rule of prejudicial error under the APA, such an acknowledgment would have been unnecessary. Moreover, the statement that § 4061(b) would "incorporate a reference to the 'rule of prejudicial error' as included in the [APA]" was made a dozen years prior to the passage of the VCAA. Even if Congress had previously intended veterans' claims notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent

passage of the VCAA, which, as previously discussed, substantially overhauled the administration of the VA benefits system. Like the Veterans Court, we, too, believe that Congress left the courts with "considerable latitude" in implementing the rule of prejudicial error. However, as discussed above, the Veterans Court overlooked the uniquely pro-claimant nature of the VA benefits system. Put simply, interpreting § 7261(b)(2) as requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA. As such, the Veterans Court's interpretation of § 7261(b)(2) is in error.

III. CONCLUSION

Because the Veterans Court incorrectly required Mr. Sanders to demonstrate prejudice in the VCAA notice error context, we reverse and remand for proceedings consistent with this opinion.

COSTS

No costs.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 06-7001

WOODROW F. SANDERS, CLAIMANT-APPELLANT

v.

GORDON H. MANSFIELD, ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLEE

[Filed: Oct. 23, 2007]

NOTE: This order is nonprecedential.

ORDER

A petition for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 30, 2007.

FOR THE COURT,

/s/ JAN HORBALY/[JB]
JAN HORBALY
Clerk

DATED: 10/23/2007

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 03-1846

WOODROW F. SANDERS, APPELLANT

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, APPELLEE

MEMORANDUM DECISION

[Aug. 25, 2005]

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Before LANCE, *Judge*.

LANCE, *Judge:* The appellant, Woodrow F. Sanders, through counsel, appeals from an October 1, 2003, Board of Veterans' Appeals (Board or BVA) decision that denied service connection for choroidoretinitis of the right eye. Record (R.) at 1-12. Single-judge disposition is appropriate. *See Frankel v. Deminski*, 1 Vet. App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the decision of the Board will be affirmed.

I. FACTS

The appellant served on active duty in the U.S. Amy from May 1942 to September 1945. R. at 16. His enlistment examination recorded that his uncorrected visual acuity was 20/20 in the [*sic*] both eyes. R. at 20. His service medical records (SMRs) are silent for any report of eye trauma or notation of eye abnormality. R. at 19-69. His separation medical examination recorded that his uncorrected visual acuity was 20/25 in the right eye and 20/20 in the left eye. R. at 69. No abnormality of the eyes was recorded. *Id.*

A December 1948 hospital record recorded the appellant's complaint of right-eye swelling and blurred vision of six months' duration. R. at 71-79. He was diagnosed with chronic, right-eye choroidoretinitis, cause undetermined. R. at 73. "Chorioretinitis" is defined as an inflammation of the choroid and retina and is synonymous with choroidoretinitis. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 346-47 (28th ed. 1994). Also in December 1948, the appellant filed a claim for service connection for a right-eye disability. R. at 81-89. He reported that he had been hospitalized at "A & NGH, Hot Springs, Arkansas," and that his right-eye condition began in June 1948, six months prior to his hospitalization. R. at 83, 86. In February 1949, the Little Rock, Arkansas, VA Regional Office (RO) denied his service-connection claim. R. at 94-95.

In August 1991, the appellant filed a statement in support of claim and attempted to reopen his service-connection claim for choroidoretinitis. R. at 97-98. He reported that while he was in Germany, a bazooka exploded on the right side of his face. R. at 97. He stated

that the explosion burned his eyebrows and facial hair and that he never saw a medic. *Id.* With regard to the onset of his right-eye disability, the appellant asserted that six months after his discharge (which would have been early 1946) he started to lose sight in the right eye and sought treatment from and was admitted to a VA hospital in Hot Springs, Arkansas. *Id.* The record is devoid of any medical records within this time frame asserted by the appellant. In a July 1992 statement, the appellant reported that the injury to his right eye occurred on September 12, 1944. R. at 100-03.

The appellant also submitted a December 1992 statement from a VA physician, Dr. Joseph Ruda, chief, ophthalmology section, and a September 1993 statement from Dr. Gregory A. Strainer, a private ophthalmologist. R. at 105, 108. Dr. Ruda recorded the appellant's past history as "being involved in a traumatic episode during WWII, being on a bridge and having it explode from underneath him and . . . [appellant's] reported . . . loss of vision since that episode in the right [eye]." *Id.* Upon physical examination, Dr. Ruda recorded "[right macular chore-retinal scar of 2 disc diameters in size of long duration[;] and [l]eft chore-retinal scar above the supertemporal arcade, 2-3 disc diameters in size." *Id.* Visual acuity was recorded as "hand motion at 1 foot in the right eye and 20/40 in the left." *Id.* Dr. Ruda offered the following opinion: "It is not inconceivable that these macular and retinal lesions in each fundi and particularly the right could have occurred secondary to trauma, as stated above by [the appellant]." *Id.*

Dr. Strainer recorded that the appellant related a history of being "involved with the battle on Mousson Hill, and [that] during this battle [he] was on a bridge which blew up underneath him, he fell and injured his

right eye. He stated that following this fall he has never been able to see properly out of his right eye." R. at 108. Upon physical examination, Dr. Strainer recorded "a large chorioretinal scar involving the right macula, and a large chorioretinal scar inferiorly in the left eye." *Id.* Visual acuity was recorded as "'count fingers' at one foot in the right eye and 20/40 in the left eye." *Id.* Dr. Strainer offered the following opinion: "This type of macular injury in his right eye can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II." *Id.*

In October 1993, the appellant submitted correspondence stating that "the attached doctor's statements [Dr. Ruda's and Dr. Strainer's] are incorrect in regard to what actually took place. My eye injury did not occur from a bridge explosion. The injury took place as stated on the attached VA Statement in Support of Claim." R. at 113. In the attached statement in support of claim, he related that his injury occurred while he was in Loisy, France, when a bazooka exploded and the right side of his face was burned by the flash. R. at 114-15. He further noted that at that time there were no medics to whom he could report his injury and that most of his fellow soldiers were killed or wounded. *Id.*

In July 1994, the RO determined that new and material evidence had not been presented to reopen his service-connection claim for choroidoretinitis. R. at 117-19. In September 1994, the appellant filed a Notice of Disagreement (NOD) and in October 1994 the RO issued a Statement of the Case (SOC). R. at 121, 123-33. In November 1994, the appellant filed a timely Substantive Appeal. R. at 135. In his Substantive Appeal, he stated that a few months after his injury he was transferred

from the infantry to an ordnance company because he could not see well enough to shoot. *Id.* The appellant also submitted two letters he wrote to his mother in November 1944 and January 1945. R. at 137-40. Neither letter refers to an eye injury. *Id.* A December 1994 medical record recorded the appellant's history of trauma from a bazooka blast and noted an impression of retinal epithelium atrophy' secondary to old trauma. R. at 143.

The appellant testified at a personal hearing in January 1995. R. at 145-55. He clarified that the injury to his right eye occurred as a result of a bazooka blast, and not as a result of a bridge explosion. R. at 150-51. On November 27, 1998, the Board denied his service-connection claim. R. at 168-79. In August 1999, pursuant to the parties' joint motion, this Court remanded the matter for further development and adjudication. R. at 182. On June 7, 2000, the Board found that new and material evidence had been presented to reopen the appellant's service-connection claim for choroidoretinitis, and remanded the claim to the RO for a VA ophthalmologic examination in order to determine the etiology of the appellant's right-eye condition. R. at 184-96.

In December 2000, the appellant was afforded a VA comprehensive eye examination by Dr. Sheila F. Anderson, chief, optometry. R. at 202-09. The appellant reported a history of injuring his right eye when a bazooka gun exploded in his face. R. at 202. He reported that he was hospitalized for his injury and that he noticed decreased vision in the right eye three days after he was released from the hospital. *Id.* Dr. Anderson's report recorded her findings on examination as well as her review of the appellant's claims file (C-file). R. at 202-09.

Dr. Anderson's assessment included decreased vision right eye from macular scar, cause unknown and a small chorioretinal scar, left eye. R. at 207. Dr. Anderson offered the following opinion:

> Based on the fact [that] the visual acuity in the right eye was 20/20 on [May 14, 1942,] and 20/25 on [September 25, 1945,] (upon discharge), it is unlikely that the decrease in vision was related to the trauma. The patient reports that the trauma happened on [September 13, 1944] and that he noticed the vision was blurry shortly thereafter ([three] days after discharge for treatment of his facial burns). However, it was not until 1948 that there is documented evidence of reduced vision and the records show that the patient reported decreased vision only 6 months prior to that visit. It is certainly possible for there to have been damage to the retina in 1944 that then hemorrhaged in 1948, as hemorrhages were noticed at that visit, but there are no other signs of ocular trauma. The chorioretinitis is mostly likely infectious in nature, although the etiology at this point is impossible to determine. It is also possible that the patient contracted some infection while in the service that caused the chorioretinitis, but there is no way to prove this either. Based on the documented records, the patient did not lose vision while on active duty.

R. at 207-08. The RO issued a Supplemental SOC (SSOC) that continued the denial of service connection for choroidoretinitis of the right eye. R. at 213-15.

In August 2001, the appellant was afforded a VA ophthalmology examination by Dr. Duane Y. Nii. R. at 245-46. The appellant reported that his right eye was injured in 1944 from a bazooka blast, which resulted in

severe decreased vision in the right eye. R. at 245. Dr. Nii's report recorded his findings on examination. R. at 245-46. Dr. Nii's assessment included dense macular scar of the right eye with small punched-out scars and early macular degeneration of the left eye. R. at 246. Dr. Nii offered the following opinion:

> The patient's decreased vision in the right eye is consistent with his clinical findings. The etiology of the patient's macular scar is more difficult to ascertain. If the patient's vision had been normal in the right eye prior to the reported injury, then it is possible that the macular scar could be related to the injury as the patient states. Due to the fact that the patient does have the additional punched out chorioretinal scars in both eyes, the possibility of toxoplasmosis as the etiology of the macular scar could also be entertained.

R. at 246.

The Board issued the decision on appeal on October 1, 2003. R. at 1-12. In the October 2003 decision, the Board denied service connection for choroidoretinitis of the right eye. *Id.* In reaching that conclusion, the Board found the December 2000 opinion by Dr. Anderson more probative than the opinions rendered by Drs. Ruda, Strainer, and Nii on the issue of whether the appellant's choroidoretinitis was related to service. R. at 12. The Board found that the preponderance of the evidence was against the claim for service connection. *Id.*

In his brief, the appellant argues for reversal of the Board's decision on the ground that there is no plausible basis for the Board's determination that the evidence preponderated against a finding of service connection. Appellant's Brief (Br.) at 5-10. He maintains that the

reports by Dr. Ruda and Dr. Strainer set forth his entitlement to service connection, and that Dr. Anderson's report does not prove otherwise. Br. at 7. In the alternative, the appellant requests that the Board's decision be vacated and the matter remanded for further development and adjudication. Br. at 10-13. He maintains that VA failed to satisfy its duty to notify as required by the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. In his brief, the Secretary argues that the Court should affirm the Board's decision because it is plausibly based on the record and VA satisfied its duty to notify. Secretary's Br. at 8-17.

II. ANALYSIS

A. Entitlement to Service Connection

Establishing service connection generally requires (1) medical evidence of a current disability; (2) medical evidence, or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. *See Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *see also* 38 C.F.R. § 3.303(a) (2004). The Board's determination of service connection and its application of the benefit-of-the doubt rule are findings of fact that the Court reviews under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4); *see Mariano v. Principi*, 17 Vet. App. 305, 313-17 (2003); *Russo v. Brown*, 9 Vet. App. 46, 50 (1996); *Swann v. Brown*, 5 Vet. App. 229, 232 (1993). "A factual finding 'is clearly erroneous when although there is evidence to support it,

the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet. App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *Id.; see also Mariano*, 17 Vet. App. at 313 (applying "clearly erroneous" standard to assess, as directed by 38 U.S.C. § 7261(b)(l), Board's application of 38 U.S.C. § 5107(b) "equipoise standard").

When rendering its decision, the Board must consider all relevant evidence of record and address in its decision all potentially applicable provisions of law and regulation. *See* 38 U.S.C. § 7104(a); *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991). The Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; that statement must be adequate to enable an appellant to understand the precise basis for the decision, as well as to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(l); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert*, 1 Vet. App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza, supra; Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994). Moreover, the benefit of the doubt rule requires the Secretary to consider all lay and medical evidence of record, and if "there is an approximate bal-

ance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); *see also* 38 C.F.R. § 3.102 (2004). However, "if a fair preponderance of the evidence is against a veteran's claim, it will be denied and the 'benefit of the doubt' rule has no application." *Gilbert*, 1 Vet. App. at 56; *see also Mariano, supra; Roberson v. Principi*, 17 Vet. App. 135, 146 (2003).

In the instant case, the Board acknowledged that because the appellant alleges that his injury occurred during combat, under 38 U.S.C. § 1154(b) and *Cohen v. Brown*, 10 Vet. App. 128 (1997), the Board may presume that the appellant's right-eye injury occurred, despite the lack of official record. R. at 9. The Board noted that although 38 U.S.C. § 1154 eases the appellant's burden to demonstrates that a particular injury occurred in service, it does not provide a basis to link etiologically the condition in service to the current condition. *See [i]d.* (citing *Cohen*, 10 Vet. App. at 138).

The Board then concluded that the competent and probative evidence of record does not establish a relationship between the right-eye choroidoretinitis and the alleged injury presumed to have been sustained in service. R. at 10. In reaching that conclusion, the Board acknowledged that there were conflicting medical opinions as to the etiology of the appellant's choroidoretinitis of the right eye. R. at 11. The Board then provided a thorough and well-reasoned analysis as to why it found the December 2000 opinion more probative than the December 1992, September 1993, and August 2001 opinions. *See* R. at 10-12. A review of the record reveals that the Board did not err in making that finding. *See*

Fenderson v. West, 12 Vet. App. 119, 127 (1999) (Board must account for evidence it finds persuasive and give adequate reasoning for its determination). Although the appellant disagrees with the Board's evaluation of that evidence, "[i]t is the responsibility of the BVA, not this Court, to assess the credibility and weight to be given to evidence." *Owens v. Brown*, 7 Vet. App. 429, 433 (1995) (Board does not err when it favors opinion of one medical expert over that of another).

In addressing the opinions rendered by Drs. Ruda and Strainer, the Board noted that neither physician had access to the appellant's SMRs or other relevant evidence. R. at 11. In this regard, the Court notes that the appellant's separation physical examination recorded his uncorrected right-eye vision as 20/25 in September 1945, one year after his injury, and his December 1948 medical records recorded a history of right-eye swelling and blurred vision that began in June 1948. R. at 69, 82, 86. The Board also noted that both opinions were offered in speculative language, and therefore were not particularly probative without consideration of relevant medical evidence. *See Bloom* v. *West*, 12 Vet. App. 185, 187 (1999) (doctor's use of word "could" without supporting clinical data or other rationale rendered doctor's opinion too speculative to provide the degree of certainty required for medical nexus evidence). In addition to the speculative nature of the opinions rendered by Drs. Ruda and Strainer, the Board noted that both opinions were based on the appellant's reported history of a bridge exploding resulting in a concussive trauma. However, the appellant later maintained that the history of a bridge exploding relied upon in each of these opinions was incorrect and that his injury was in the nature of a burn. *See Reonal*

v. Brown, 5 Vet. App. 458, 460-61 (1993) (opinion based upon an inaccurate factual premise has no probative value). In light of the fact that both opinions were based on the appellant's recitation of an injury that occurred 48 years earlier, were phrased as "possibilities" without the benefit of review of other relevant medical evidence, and were based on a description of how the injury was sustained that the appellant has admitted is inaccurate, the Court is satisfied that the Board provided an adequate statement of reasons or bases for why it did not find either opinion probative on the question whether the appellant's in-service injury caused his choroidoretinitis.

The Board next considered the report of the August 2001 VA ophthalmology examination in which Dr. Nii opined that the etiology of the right-eye disorder could be related to the injury described by the appellant. R. at 11, 246. However, the Board found that this report also lacked significant probative value because it did not indicate that the examiner had access to or reviewed pertinent medical evidence and because his etiology opinion was also speculative. *Id.* In that regard, the Board noted that although Dr. Nii related that the appellant's right-eye disorder could be related to the injury as stated by the appellant, Dr. Nii also opined that the possibility of toxoplasmosis as the etiology of the macular scar could also be entertained. *Id.*

Finally, the Board considered the December 2000 VA opinion rendered by Dr. Anderson. R. at 12, 202-08. Although the appellant notes that the Board incorrectly referred to the examiner as an ophthalmologist, rather than an optometrist, there is no indication in the record, nor has the appellant demonstrated that Dr. Anderson

was not competent to render an etiology opinion. Br. at 9. The Board found Dr. Anderson's opinion to be more probative on the issue of whether the appellant's right-eye condition was related to service. R. at 12. In reaching that conclusion, the Board noted that Dr. Anderson affirmatively opined that the appellant did not lose his right-eye vision during service or as a result of the alleged in-service trauma. *Id.* Dr. Anderson's report reveals that she rendered her opinion based upon a review of the appellant's C-file, including the appellant's visual acuity loss reported at enlistment and at discharge, relevant medical evidence and her physical findings on examination. R. at 207. She determined that "it is unlikely that the decrease in vision was related to the trauma." *Id.* The Board found her opinion "supported by explanation with reference to visual acuity at entrance and separation as shown in [SMRs], as well as initial findings of visual loss documented in records of the December 1948 post-service hospitalization." *Id.* She further opined that the choroidoretinitis is "most likely infectious in nature, although the etiology at this point is impossible to determine." R. at 208. In that regard, Dr. Anderson stated that it is "possible that the [appellant] contracted some infection while in the service that caused the chorioretinitis, but there is no way to prove this either." *Id.* Contrary to the appellant's assertions, Dr. Anderson's opinion does not establish a claim for service connection on the theory of infection. Although Dr. Anderson opined that the cause of the choroidoretinitis was "most likely" infectious in nature, she could not state without speculating whether the infection was contracted in service. *See Bloom, supra.*

Accordingly, the Court holds that there is a plausible basis in the record for the Board's decision and that the Board's decision is not clearly erroneous. *See* 38 U.S.C. § 7261(a)(4), (b)(l); *Mariano* and *Gilbert*, *supra*. Moreover, the Board provided an adequate statement of reasons or bases that sufficiently explains why, in the view of the Board, the December 2000 opinion of Dr. Anderson outweighs the opinions of Drs. Ruda, Strainer, and Nii. R. at 11-12; *see* 38 U.S.C. § 7104(a), (d)(1).

B. VCAA

The appellant argues that the Secretary did not fulfill his duty to notify him under 38 U.S.C. § 5103(a). Appellant's Br. at 4-7. The Secretary is required to inform the claimant of the information and evidence not of record (1) that is necessary to substantiate the claim, (2) that the Secretary will seek to obtain, if any, and (3) that the claimant is expected to provide, if any. *See* 38 U.S.C. § 5103(a); *Mayfield v. Nicholson*, 19 Vet. App. 103, 110 (2005) (citing *Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002)); 38 C.F.R. § 3.159(b) (2004). The Secretary is also required to "request that the claimant provide any evidence in the claimant's possession that pertains to the claim." *Mayfield*, *supra* (quoting 38 C.F.R. § 3.159(b)(1)); *see also Pelegrini v. Principi*, 18 Vet. App. 112, 121 (2004). The notice required under statutory section 5103(a) and regulatory § 3.159(b) must be provided upon receipt of a complete or substantially complete application for benefits and prior to an initial unfavorable decision on a claim by an agency of original jurisdiction such that the claimant has a "meaningful opportunity to participate effectively in the processing

of his or her claim." *Mayfield*, 19 Vet. App. at 120-21. The Secretary's failure to inform the appellant what evidence is necessary to substantiate his claim is presumptively prejudicial. *Mayfield*, 19 Vet. App. at 122. Any other statutory section 5103(a) or regulatory § 3.159(b) notice error, including an error in the timing of the notice, is not remandable error unless the appellant "identif[ies], with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain . . . had the Secretary fulfilled his notice obligations; further, an appellant must also assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication." *Id.* at 121.

In this case, the appellant contends that VA failed to provide notice of who would ultimately be responsible for obtaining evidence necessary to substantiate the claim and that VA failed to provide proper notice before the initial unfavorable decision by the agency of original jurisdiction. Br. at 10-12. However, the appellant has not alleged any specific prejudice caused by the asserted notice and timing errors. *Id.* Thus, insofar as the appellant has failed to plead with any specificity how the alleged notice and timing errors affected the essential fairness of the adjudication, the Court holds that the appellant has failed to meet his burden of going forward and, therefore, need not consider whether any error occurred. *See Mayfield*, 19 Vet. App. at 121.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record on appeal, and the parties' briefs, the Board's October 1, 2003, decision is AFFIRMED.

DATED: [AUG 25 2005]

APPENDIX D

BOARD OF VETERANS' APPEALS
DEPARTMENT AFFAIRS OF VETERANS
WASHINGTON, DC 20420

Docket No. 95-41 119
C 13 575 481

IN THE APPEAL OF WOODROW F. SANDERS

Date: [Oct. 1, 2003]

On appeal from the
Department of Veterans Affairs Regional Office in
Los Angeles, California

THE ISSUE

Entitlement to service connection for choroidoretinitis of the right eye.

REPRESENTATION

Appellant represented by: Mark R. Lippman, Attorney

WITNESS AT HEARING ON APPEAL

Veteran

ATTORNEY FOR THE BOARD

Michelle L. Nelsen, Counsel

INTRODUCTION

The veteran had active service from May 1942 to September 1945.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a July 1994 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Los Angeles, California.

The July 1994 rating decision found no new and material evidence to reopen the claim for service connection originally denied in February 1949. In subsequent rating actions, the RO reopened the claim but denied the claim on the merits. In a November 1998 decision on appeal, the Board denied service connection for choroidoretinitis of the right eye. The veteran appealed that deci-sion to the U.S. Court of Appeals for Veteran's Claims (Court). In an August 1999 Order, the Court vacated the Board decision and remanded the matter for readjudication, to include consideration of whether there was new and material evidence to reopen. In a June 2000 decision, the Board found new and material evidence to reopen the claim but determined that additional evidence was needed before adjudicating the appeal on the merits. It remanded the case to the RO to accomplish such development. On remand, the RO has continued to deny service connection for choroidoretinitis of the right eye. The case returns to the Board for final appellate review.

The Board notes that correspondence from the veteran received in April 2001 included a request for a Travel Board hearing. However, the veteran withdrew that request in August 2003.

FINDINGS OF FACT

1. The RO has provided all required notice and obtained all relevant evidence necessary for the equitable disposition of the veteran's appeal.

2. There is no evidence of right eye disorder in service or for several years thereafter.

3. The competent and probative evidence of record does not establish a nexus between the veteran's current right eye disorder and his period of active service or injury incurred or presumed to have been incurred therein.

CONCLUSION OF LAW

Service connection for choroidoretinitis of the right eye is not established. 38 U.S.C.A. §§ 1110, 1154, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.304 (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Board observes that the Veterans Claims Assistance Act of 2000 (VCAA), 38 U.S.C.A. § 5100 *et seq.* (West 2002), eliminated the requirement for a well-grounded claim, enhanced VA's duty to assist a claimant in developing facts pertinent to his claim, and expanded VA's duty to notify the claimant and his representative, if any, concerning certain aspects of claim development. VA promulgated regulations that implement these statutory changes. *See* 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2002).

Review of the claims folder reveals compliance with the VCAA. Specifically, in a June 2003 letter, the RO set forth the requirements for establishing service connection for his disorder. It also explained the notice and assistance provisions of the VCAA, including VA's duty to obtain records such as service medical records and records held by other federal agencies and the veteran's responsibility to provide other evidence, such as medical records, or to provide VA with enough information to attempt to obtain such evidence on his behalf. The RO also listed the evidence already of record for the appeal and asked the veteran and his representative to identify any other evidence that would aid in adjudicating the appeal. The Board is satisfied that the notice requirements of the VCAA have been met. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

With respect to the duty to assist, the RO has secured service medical records, VA treatment records, private medical evidence as authorized by the veteran, and relevant medical examinations and opinions. *See Charles v. Principi*, 16 Vet. App. 370 (2002). The veteran has also submitted several lay statements and additional private medical evidence. There is no indication from the claims folder or allegation from the veteran or his representative that additional pertinent evidence remains outstanding. Accordingly, the Board finds that the duty to assist the veteran has been satisfied. 38 U.S.C.A. § 5103A.

Finally, the veteran has had ample opportunity to present evidence and argument in support of his appeal. As the RO has provided all required notice and

assistance, the Board may proceed to adjudicate the appeal without any prejudice to the veteran. *Bernard v. Brown*, 4 Vet. App. 384, 392-94 (1993).

The Board is also satisfied as to compliance with its instructions from the June 2000 remand. *See Stegall v. West*, 11 Vet. App. 268 (1998).

Factual Background

Service medical records were negative for any report of eye trauma or notation of eye abnormality. The report of the September 1945 physical examination at separation showed no abnormality of the eyes. Uncorrected visual acuity was 20/25 in the right eye and 20/20 in the left eye. His Army Separation Qualification Record showed principal duties in service of basic engineer, light truck driver, general carpenter, and demolition specialist.

The veteran's original claim, received in December 1948, indicated that the right eye disorder began in June 1948. He did not report any treatment related to the right eye in service.

Records from the Army and Navy General Hospital showed that the veteran was hospitalized in December 1948. It was noted that, six months before, the veteran's right eye became swollen and vision began to blur. Two weeks before, he underwent a physical and was refused employment. He came to the hospital for examination and treatment. Examination at admission revealed severe macular chorio-retinitis of the right eye, cause undetermined, with definite area of blindness in the central visual field. The final diagnosis was chronic right chor-

oidoretinitis, cause undetermined, 20/20 vision in the left eye and form vision in the right eye.

A January 1949 statement from J.M.F. related that he had known the veteran both before and after service. He stated that the veteran had almost lost sight in one eye.

In an August 1991 statement, the veteran indicated that a bazooka exploded on the right side of his face while in service in Germany during combat. The explosion burned his eyebrows and facial hair. He never saw a medic, just brushed it off and went about his business. About six months after discharge, the veteran started losing sight in his right eye. He was hospitalized at the VA hospital in Hot Springs, Arkansas. He believed his right eye condition was caused by the bazooka explosion. In a July 1992 statement, the veteran added that the injury in service occurred in September 1944 while he was building a bridge. He stated that a bazooka round blasted back into his face and blinded his right eye. He received treatment about six months after discharge at VA facilities in both Hot Springs and Little Rock. The veteran provided essentially the same information in an undated later to a service acquaintance.

A statement from a VA physician dated in December 1992 described the veteran's report of a bridge exploding from underneath him during World War II, with a loss of vision on the right since that incident. Findings on physical examination included right macular chore-retinal scar and left chore-retinal scar. The VA physician stated that it is not inconceivable that the macular and retinal lesions in each eye, particularly on the right,

could have occurred secondary to trauma, as stated by the veteran.

G. Stainer, M.D., related in a September 1993 statement that the veteran was apparently involved in a battle in service in which a bridge blew up underneath him. He fell and injured his right eye. Following the fall, he was never able to see properly out of the right eye. Examinations findings included large chorioretinal scar involving the right macula and a large chorioretinal scar on the left eye. Dr. Stainer indicated that this type of macular injury in the right eye "can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II."

In a September 1993 statement, J.J.V. indicated that he does not know the veteran personally. He was at the same battle area where the veteran alleged to have injured his right eye. The veteran told him he injured his right eye while loading a bazooka.

Correspondence from the veteran dated in October 1993 again described how he injured his right eye in service, noting that there were no medics to whom he could report. He added that he was the only one to leave the battle alive so there were no witnesses to his injury. In about December 1945, he was refused employment as a demolitions specialist because of blindness in the right eye. About six months later, the veteran went to an eye doctor, who referred him to the VA hospital in Little Rock. He ultimately saw another private physician as well as VA doctors in Hot Springs. Finally, the veteran stated that reports of the injury provided in the December 1992 VA doctor statement and the September 1993 statement from Dr. Stainer,

indicating that a bridge exploded from underneath him, were incorrect.

In the veteran's November 1994 substantive appeal, he related that, a few months after his injury, he was transferred from the infantry to an ordnance company because he could not see well enough to shoot.

The veteran testified at a personal hearing in January 1995. He described how his face and eye brows were burned from the bazooka blast in September 1944. He did not know anything was wrong with the eye until he was transferred to a field hospital in France where he stayed for about two weeks. He did not receive any care for the eye. When he returned to his unit, he realized he could not see out of his right eye and told his commanding officer. He was transferred to an ordnance unit. The veteran again related his post-service history of treatment for the eye.

During the hearing, the veteran submitted a medical records from J. Shuler, M.D., reflecting an evaluation performed in December 1994. Notes indicate that the veteran felt that his right eye vision loss was due to trauma in 1944. At that time, he suffered bums to the right side of the face with eye damage. Findings on examination were provided. The impression was retinal pigment epithelium atrophy secondary to old trauma. Also during the hearing, the veteran submitted copies of letters he sent to his mother. In November 1944, he related that he had been sick with chills and fever and had a boil on his knee. In January 1945, he wrote that he had been transferred to ordnance.

The veteran was afforded a VA ophthalmology examination in December 2000. He reported injuring the right eye in September 1944 when a bazooka exploded in his face. He was hospitalized for the injury. He related that he noticed decreased vision in the right eye three days after he left the hospital. The examination included comprehensive physical evaluation as well as review of the veteran's VA medical evidence, service medical records, and the records of the veteran's December 1948 hospitalization. The assessment included decreased vision of the right eye from macular scar, cause unknown. Considering the veteran's right eye visual acuity as recorded at entrance to and separation from service, 20/20 and 20/25, respectively, the examiner opined that it was unlikely that the decrease in vision was related to trauma. Although the veteran reported the trauma as occurring in September 1944 with noted decrease in vision three days later, there is no documented evidence of reduced vision until 1948. Those records showed that the veteran reported at that time that the vision loss started only six months before the visit. Although it was possible that there was damage to the retina in 1944 that hemorrhaged in 1948, there were no other signs of ocular trauma. The examiner added that the chorioretinitis was most likely infectious in nature, although the etiology and onset of the infection was impossible to determine at this time. Based on the documented records, the examiner concluded that the veteran did not lose vision while on active duty.

In August 2001, the veteran underwent another VA ophthalmology examination. He stated that his right eye was injured in 1944 due to a bazooka blast that

resulted in severe decreased vision in the right eye. The impression following examination included dense macular scar of the right eye with small punched out scars in both eyes. The examiner stated that the etiology of the macular scar was difficult to ascertain. If the veteran's vision had bee normal in the right eye before the reported injury, then it was possible that the macular scar could be related to the injury as the veteran states. However, because the veteran had punched out chorioretinal scars in both eyes, it was possible that the etiology of the macular scar was toxoplasmosis.

Analysis

Service connection may be granted if the evidence demonstrates that a current disability resulted from an injury or disease incurred or aggravated in active military service. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. § 3.303(a) (2003). Service connection generally requires evidence of a current disability with a relationship or connection to an injury or disease or some other manifestation of the disability during service. *Boyer v. West*, 210 F.3d 1351, 1353 (Fed. Cir. 2000). Where the determinative issue involves medical causation or a medical diagnosis, there must be competent medical evidence to the effect that the claim is plausible; lay assertions of medical status do not constitute competent medical evidence. *Grottveit v. Brown*, 5 Vet. App. 91, 93 (1993); *Espiritu v. Dewinski*, 2 Vet. App. 492, 494 (1992).

A disorder may be service connected if the evidence of record reveals that the veteran currently has a disorder that was chronic in service or, if not chronic,

that was seen in service with continuity of syrnptomatology demonstrated thereafter. 38 C.F.R. § 3.303(b); *Savage v. Gober*, 10 Vet. App. 488, 494-97 (1997). Evidence that relates the current disorder to service must be medical unless it relates to a disorder that may be competently demonstrated by lay observation. *Savage*, 10 Vet. App. at 495-97. For the showing of chronic disease in service, there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "chronic." 38 C.F.R. § 3.303(b).

Disorders diagnosed after discharge may still be service connected if all the evidence, including pertinent service records, establishes that the disorder was incurred in service. 38 C.F.R. § 3.303(d).

If an injury or disease was alleged to have been incurred or aggravated in combat, such incurrence or aggravation may be shown by satisfactory lay evidence, consistent with the circumstances, conditions, or hardships of combat, even if there is no official record of the incident. 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d). "Satisfactory evidence" is credible evidence. *Collette v. Brown*, 82 F.3d 389, 392 (1996). Such credible, consistent evidence may be rebutted only by clear and convincing evidence to the contrary. 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d). The statute, does not establish a presumption of service connection, but eases the combat veteran's burden of demonstrating the occurrence of some in-service incident to which the current disability may be connected. *See Clyburn v. West*, 12 Vet. App. 296 (1999); *Caluza v. Brown*, 7 Vet.

App. 498, 507 (1995). That is, it may provide a factual basis for determining that a particular injury was incurred in service but not a basis to establish an etiological link between the in-service injury and the current disorder. *Cohen v. Brown*, 10 Vet. App. 128, 138 (1997) (citing *Libertine v. Brown*, 9 Vet. App. 521,524 (1996); *Caluza, supra*).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the benefit of the doubt is afforded the claimant. 38 U.S.C.A. § 5107(b).

In this case, service medical records are negative for any complaint or treatment of a right eye injury, facial burns, or any sort of injury potentially associated with the injury the veteran's alleges to have incurred in September 1944. Although service medical records reflect admission for medical care in November 1944, treatment was provided for cellulitis of the right leg. The Board also notes that statements from J.M.F. and J.J.V., as well as the veteran's letters to his mother in 1944 and 1945, do not support the veteran's allegation that he sustained a right eye injury in service. Neither lay statement purports to have first-hand knowledge of the alleged injury. The veteran's letters home, both written well after the date the injury was alleged to have occurred, do not describe any eye injury or complaint of vision loss.

The Board acknowledges that the veteran alleges that this injury occurred during the course of a battle. Thus, pursuant to 38 U.S.C.A. § 1154(b), the Board may presume that the injury itself occurred, despite the lack of official record. However, even assuming that the

injury described by the veteran actually occurred, subsequent service medical records fail to demonstrate any report or finding of vision loss in the right eye, which the veteran alleges to have noticed in service. The report of physical examination at separation in September 1945 shows uncorrected vision of 20/25 in the right eye. Although vision at the entrance examination is recorded as 20/20 in the right eye, this evidence does not reflect the type of serious vision loss, i.e., inability to see well enough to shoot, the veteran relates he noticed in service. Thus, the Board cannot conclude that there is evi-dence of chronic right eye disorder in service. 38 C.F.R. § 3.303(b); *Savage*, 10 Vet. App. at 494-95.

The first post-service evidence of right eye disorder is shown in hospitalization records dated in December 1948. The veteran's statements at that time offered for the purpose of treatment indicate that the right eye symptoms began only six months before. There is no mention of prior eye injury, during service or at any oth-er time, and no description of bums or eye injury from a bazooka blast. In fact, in his December 1948 claim, the veteran also described the disorder as beginning in June 1948 and failed to report any eye-related problems in service. Thus, even assuming the in-service incurrence of right eye injury pursuant to 38 U.S.C.A. § 1154(b), at least as of the time of the December 1948 hospitalization and claim, the veteran offered no evidence of continuous symptoms involving the right eye after service. 38 C.F.R. § 3.303(b); *Savage*, 10 Vet. App. at 496-97.

Moreover, the Board finds that the competent and probative evidence of record does not establish a rela-tionship between the right eye choroidoretinitis and the alleged injury presumed to have been incurred in

service under 38 U.S.C.A. § 1154(b). Initially, the Board observes that the veteran has expressed his personal belief that his right eye problems are the result of a blast to his from a bazooka while in service. The veteran is certainly competent to relate and describe events or incidents he experienced in service. However, as a lay person without medical training or education, he is not competent to offer an opinion as to the etiology of a medical disorder. *Grottveit*, 5 Vet. App. at 93; *Espiritu*, 2 Vet. App. at 494.

Review of the record reveals conflicting medical opinions as to the etiology of the right eye disorder at issue. The Board has a duty to analyze the credibility and probative value of the evidence of record. *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997); *Wensch v. Principi*, 15 Vet. App. 362, 367 (2001); *Owens v. Brown*, 7 Vet. App. 429, 433 (1995). When adequately explained, the Board is free to favor one medical opinion over another. *Evans v. West*, 12 Vet. App. 22, 26 (1998).

The December 1992 statement from the VA physician and the September 1993 statement from Dr. Stainer both suggest that it is possible that the veteran's right eye disorder could have resulted from the trauma he described. First, the Board notes that each opinion appears to be based solely on the history of injury provided by the veteran, as well as current physical examination. There is no indication that either physician had access to service medical records or other relevant evidence. A medical opinion that relies on history as related by the veteran is no more probative than the facts alleged by the veteran. *Swann v. Brown*, 5 Vet. App. 229, 233 (1993). However, as discussed above, we can presume that the veteran suffered injury during combat

according to the provisions of 38 U.S.C.A. § 1154(b). On this point, the Board observes that the trauma set forth in each statement is a bridge exploding from underneath the veteran. Dr. Stainer states that the injury could be "concussive in nature." However, the veteran maintains that he sustained the injury, particularly burns, from a blast, not a concussion. In fact, he now maintains that the history of injury from these statements is incorrect. Finally, the Board notes that the opinions from the VA physician and Dr. Stainer are both phrased as possibilities, i.e., that the current right eye disability could have resulted from the injury described by the veteran. An opinion offered in such speculative language and without the benefit of consideration of relevant medical evidence is not particularly probative. See *Bloom v. West*, 12 Vet. App. 185 (1999); *Obert v. Brown*, 5 Vet. App. 30 (1993).

The Board acknowledges that the report of the August 2001 VA ophthalmology examination does not suggest that the examiner had access to or reviewed pertinent medical evidence. In addition, the opinion as to the etiology of the right eye disorder is also speculative, noting that it could be related to the injury described by the veteran or could be related to toxoplasmosis, as the *left* eye also demonstrated chorioretinal scars. Thus, this opinion also lacks significant probative value. *Id.* The December 1994 opinion from Dr. Shuler, though not stated in speculative terms, is also based solely on the history of injury as reported by the veteran, and thus lacks any real probative value. *Id.*

On the other hand, the December 2000 VA ophthalmology examiner affirmatively opines that the veteran did not lost right eye vision during service or due to the

alleged in-service trauma. In fact, she states that the chorioretinitis was most likely infectious in nature. The opinion is supported by explanation with reference to visual acuity at entrance and separation as shown in service medical records, as well as initial findings of visual loss documented in records of the December 1948 post-service hospitalization. The examiner concedes that the veteran could have suffered damage to the retina in 1944 that could have hemorrhaged in 1948, but finds no other evidence of ocular trauma. She could not relate any possible infection to the veteran's period of active service. The Board finds this opinion to be more probative on the issue of whether the veteran's current right eye disorder is related to service. *Evans*, 12 Vet. App. at 26.

In conclusion, the Board finds that the preponderance of the evidence is against service connection for choroidoretinitis of the right eye. 38 U.S.C.A. § 5107(b). Therefore, the appeal is denied.

ORDER

Service connection for choroidoretinitis of the right eye is denied.

/s/ V.L. JORDAN
V. L. JORDAN
Veterans Law Judge, Board of
Veterans' Appeals

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7092

PATRICIA D. SIMMONS, CLAIMANT-APPELLEE

v.

R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLANT

Filed: May 16, 2007

Before NEWMAN, MAYER, and PROST, Circuit Judges.

PROST, Circuit Judge.

The Secretary of Veterans Affairs appeals a decision by the United States Court of Appeals for Veterans Claims ("Veterans Court") that vacated and remanded a decision by the Board of Veterans' Appeals ("Board") denying Patricia D. Simmons's claim for service connection for hearing loss in her right ear and for an increased rating for hearing loss in her left ear. *Simmons v. Nicholson*, No. 03-1731, 2005 WL 3312625 (Vet. App. Dec. 1, 2005). Because the Veterans Court properly placed the burden on the Secretary to establish that an error in a notice the Department of Veterans Affairs ("VA") was required to give Ms. Simmons was not prejudicial, we affirm and remand for further proceedings.

I. BACKGROUND

Ms. Simmons served in the United States Navy from December 1978 to April 1980. Upon her discharge in April 1980, she filed a claim with the VA for disability benefits for hearing loss in her left ear. In November 1980, the VA regional office ("VARO") determined that Ms. Simmons's in-service work environment had aggravated a pre-existing hearing impairment in her left ear, causing further hearing loss. The VARO concluded, however, that her degree of hearing loss did not warrant compensation under the applicable rating schedule.

In March 1998, Ms. Simmons asked the VARO to reopen her claim for disability compensation for her left-ear hearing loss and to amend her claim to include a request for compensation for hearing loss in her right ear. The VARO denied her claim in August 1998. On appeal, the Board remanded her claim back to the VARO, directing it to, among other things, comply with the notice requirements imposed by the newly-enacted Veterans Claims Assistance Act of 2000 ("VCAA"), 38 U.S.C. § 5103(a).[1]

Accordingly, on remand, the VARO sent Ms. Simmons a letter in March 2001 in an effort to comply with the VCAA notice requirements. Subsequently, the VARO denied Ms. Simmons's claim. The Board affirmed.

---

[1] The notice requirements of § 5103(a) are described in more detail below and in our opinion in *Sanders v. Nicholson*, 487 F.3d 881, No. 06-7001, 2007 WL 1427720 (Fed. Cir. May 16, 2007). In essence, § 5103(a) requires the VA to notify claimants of the evidence needed to substantiate their claims.

Ms. Simmons appealed to the Veterans Court, arguing, in part, that the VA failed to comply with the VCAA notice requirements. Specifically, Ms. Simmons contended that the VA's March 2001 letter failed to identify (1) the information or evidence needed to substantiate her claim for an increased rating, (2) which portion of the information and evidence, if any, was to be provided by Ms. Simmons, and (3) which portion, if any, the Secretary would attempt to obtain on her behalf.

The Veterans Court agreed with Ms. Simmons and remanded her claim for further proceedings. According to the Veterans Court, the VCAA required the VA to notify Ms. Simmons of the evidence needed to establish a claim for an increased disability rating. But instead of identifying the evidence needed for an increased-rating claim, the March 2001 notice letter erroneously stated that Ms. Simmons's claim required evidence to establish the three elements of service connection-elements that had already been established back in November 1980. Such an error, the court held, "constitute[d] a VA failure to 'provide a key element of what it takes to substantiate her claim, thereby precluding her from participating effectively in the processing of her claim, which would substantially defeat the purpose of section 5103(a) notice.'" *Simmons*, 2005 WL 3312625, at *7 (quoting *Mayfield v. Nicholson*, 19 Vet. App. 103, 122 (2005) ("*Mayfield I*"), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006)). Because it held that this type of error had "the natural effect of producing prejudice," the court placed the burden on the VA to demonstrate that Ms. Simmons was not prejudiced by the defective notice letter. *Id.* And because the VA did not meet this burden, the court remanded Ms. Simmons's claim for fur-

ther development and directed the VA to comply with the VCAA notice requirements.

The Secretary of the VA appeals to this court. We have jurisdiction under 38 U.S.C. § 7292. *See Conway v. Principi*, 353 F.3d 1369, 1373-74 (Fed. Cir. 2004).

II. DISCUSSION

A. Standard of Review

In reviewing a Veterans Court decision, this court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions" and set aside any regulation or interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1) (2006). We review questions of statutory interpretation de novo. *Summers v. Gober*, 225 F.3d 1293, 1295 (Fed. Cir. 2000). Except to the extent that an appeal presents a constitutional issue, this court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2).

B. Prejudicial Error Rule in the VCAA Context

This case requires us to interpret the meaning of "the rule of prejudicial error" as it applies to the notice requirements of the VCAA. Our opinion in *Sanders v. Nicholson*, 487 F.3d 881, No. 06-7001, 2007 WL 1427720 (Fed. Cir. May 16, 2007), which is being issued concur-

rently with this opinion, resolves this issue. Accordingly, we will provide only a brief summary here.

The VCAA notice requirements are contained within 38 U.S.C. § 5103(a), which states:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

The statutory notice requirement of § 5103(a) is implemented in 38 C.F.R. § 3.159(b)(1), which provides, in pertinent part:

> When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim.

As we explain in *Sanders*,

> the notice required by the VCAA can be divided into four separate elements: (1) notice of what information or evidence is necessary to substantiate the claim; (2) notice of what subset of the necessary information or evidence, if any, that the claimant is to provide; (3) notice of what subset of the necessary information or evidence, if any, that the VA will attempt to obtain; and (4) a general notification that the claimant may submit any other evidence he or she has in his or her possession that may be relevant to the claim. Errors with regard to these elements are referred to as first-element, second-element, third-element, and fourth-element notice errors, respectively.

487 F.3d at 886.

In *Conway v. Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004), this court held that the Veterans Court must review appeals alleging VCAA notice errors for prejudicial error. The basis for our holding in *Conway* was 38 U.S.C. § 7261(b)(2), which states that the Veterans Court shall "take due account of the rule of prejudicial error" when reviewing the record of proceedings before the Secretary and the Board of Veterans' Appeals. The court in *Conway*, however, did not express an opinion as to what it means for the Veterans Court to "take due account" of the rule, nor did it define what constituted prejudicial error. *Conway*, 353 F.3d at 1375.

Subsequently, in *Mayfield I*, the Veterans Court took it upon itself to address how to apply the rule of prejudicial error in the context of the VCAA notice requirements. First, the court held that a claimant asserting a VCAA notice error bears the initial burden of establishing that a notice error has, indeed, been commit-

ted, by referring to specific deficiencies in the documents in the record on appeal, including any documents that may have been relied on as satisfying the notice requirements of § 5103(a). *Mayfield I*, 19 Vet. App. at 111.

Next, the court in *Mayfield I* held that "an error is prejudicial if it affects the 'substantial rights' of the parties in terms of 'the essential fairness of the [adjudication].'" *Id.* at 115 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)). With respect to the first notice element—notice regarding the information and evidence necessary to substantiate the claim—the court held that the natural effect of an error would be to "preclud[e the claimant] from participating effectively in the processing of her claim, which would substantially defeat the very purpose of section 5103(a) notice." *Id.* at 122. Accordingly, the court concluded that a first-element notice error should be presumed prejudicial, and that the VA had the burden of demonstrating that the claimant was not prejudiced by the notice error. *Id.*

In this case, the Veterans Court applied the *Mayfield I* framework to Ms. Simmons's claim that the March 2001 letter did not comply with the notice requirements of the VCAA. First, the court determined that the March 2001 letter did not identify the information and evidence necessary to substantiate Ms. Simmons's claim—a first-element notice error. Next, the court placed the burden on the Secretary to demonstrate that Ms. Simmons was not prejudiced by the defective notice. That is, the court required the Secretary to demonstrate that the purpose of the notice was not frustrated—for example, by demonstrating: (1) that any

defect in notice was cured by actual knowledge on the part of Ms. Simmons, (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not possibly have been awarded as a matter of law. Because the VA did not meet this burden, the court remanded Ms. Simmons's claim for further development and directed the VA to comply with the VCAA notice requirements.

On appeal to this court, the Secretary does not take issue with the Veterans Court's determination that the March 2001 notice letter contained a first-element notice error. Instead, the Secretary argues that the Veterans Court misinterpreted the rule of prejudicial error when it presumed that the defective notice was prejudicial to Ms. Simmons and placed the burden on the VA to demonstrate otherwise. According to the Secretary, the Veterans Court should have placed the burden on Ms. Simmons to establish that she was prejudiced by the defective notice.

Our opinion in *Sanders* resolves this issue. As we stated in *Sanders*, once the veteran establishes that the VA has committed a VCAA notice error, the Veterans Court should presume that such error was prejudicial to the veteran. *Sanders*, 487 F.3d at 891. The VA may rebut this presumption by establishing that the error was not prejudicial to the veteran. *Id.* Consequently, for the reasons set forth in *Sanders*, we reject the Secretary's argument and hold that the Veterans Court properly placed the burden on the Secretary to establish that the notice error was not prejudicial.

III. CONCLUSION

The decision of the Veterans Court is affirmed. The case is remanded for further proceedings.

COSTS

No costs.

AFFIRMED AND REMANDED

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7092

PATRICIA D. SIMMONS, CLAIMANT-APPELLEE

v.

GORDON H. MANSFIELD, ACTING SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLANT

[Filed: Oct. 24, 2007]

ORDER

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, IT IS

ORDERED that the petition for rehearing be, and the same hereby is DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is DENIED.

The mandate of the court will issue on October 31, 2007.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: 10/24/2007

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 03-1731

PATRICIA D. SIMMONS, APPELLANT

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

MEMORANDUM DECISION

[Dec. 1, 2005]

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Before DAVIS, *Judge.*

DAVIS, *Judge:* The appellant, veteran Patricia D. Simmons, through counsel, appeals from a June 3, 2003, decision of the Board of Veterans' Appeals (Board or BVA) that denied her claim for Department of Veterans Affairs (VA) secondary service connection for a right-ear hearing loss disability and denied her increased-rating claim for a left-ear disability rating. Record (R.) at 11. Each party filed a brief and the appellant has also filed a reply brief. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and

7266(a) to review the June 2003 Board decision. Single-judge disposition is appropriate here because the case is one of relative simplicity whose outcome is controlled by the Court's precedents and is not "reasonably debatable". *Frankel* v. *Dewinski*, 1 Vet. App. 23,25-26 (1990). For the reasons provided below, the Court will vacate the June 2003 Board decision and remand the matter for further readjudication consistent with this decision.

I. Relevant Background

Veteran Patricia Simmons served on active duty in the U.S. Navy from December 1978 to April 1980. R. at 15. Three months into her tour of duty, Mrs. Simmons underwent a routine VA medical examination and was diagnosed as having hearing impairment. R. at 17-18. While on duty, she worked in "yellow gear" (otherwise referred to as flight deck support gear or aircraft handling equipment), which constantly required her to be in a noisy work environment. R. at 46. As a consequence of such work, upon her discharge from naval service, Mrs. Simmons' hearing had become increasingly impaired. R. at 42. In April 1980, she filed with a VA regional office (RO) an application for VA disability benefits for hearing loss in her left ear. R. at 50-51. In November 1980, the RO concluded that Mrs. Simmons' in-service work environment aggravated her left-ear hearing loss condition; however, under the applicable rating schedule, it concluded that her claim did not warrant compensable service connection. R. at 67. Despite the numerous audiological examinations and medical evidence collected in support of her left-ear hearing loss disability since November 1980, the Board concluded in its decision on appeal that there was no medical evidence

in the record warranting an increased rating for that condition. R. at. 11.

In March 1998, Mrs. Simmons requested the RO "amend her service[-]connection claim to include [her] right[-]ear hearing loss," on the grounds that "since the decrease of [her] hearing in [her] left ear has gotten worse it is causing [her] right ear to have to work harder and has caused a hearing loss in the right ear." R. at 124. In August 1998, the RO denied Mrs. Simmons' right-ear hearing loss claim because it "neither occurred in nor was caused by service." R. at 153. However, on appeal, the Board remanded the matter to the RO for it to determine whether her right-ear hearing loss claim qualified for secondary service connection as well as to, among other things, (1) comply with VA's duty-to-assist and duty-to-notify requiremetns under the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (VCAA), and (2) obtain a VA medical examiner's opinion "as to whether it is at least as likely as not that hearing loss in the right[] ear is caused by her service[-] connected left[-]ear hearing loss and whether it is least as likely as not that her service[-]connected left[-]ear hearing loss results in an increase in severity of her right[-]ear hearing loss." R. at 189.

On remand, the RO underwent several actions in an attempt to meet the Board's remand requirements and to process her claims in preparation for a final determination. First, in March 2001, the RO sent her a letter regarding the enactment of the VCAA, and of VA's duty-to-assist and duty-to-notify requirements pursuant to that statute and implementing regulations. R. at 192-96. In addition, the R0 scheduled a VA medical examination

to evaluate Mrs. Simmons' right-ear hearing loss in January 2002; however, the record indicates that she failed to report to that scheduled examination. R. at 214. The following month, the RO wrote Mrs. Simons a letter, notifying her of the potentially adverse impact on her claim for failing to report to a scheduled examination without good cause and requesting the reasons for why she failed to show in January 2002. R. at 216. In April 2002, Mrs. Simons wrote the RO a letter informing it that she had recently moved, listing her current address as "**[REDACTED]**," that as a result of this change in address, she did not receive the RO's February 2002 letter, and that she would be available to appear for another VA medical examination, and the RO should contact her at her current address. R. at 220 (emphasis added).

The record indicates that the RO scheduled a, second VA medical examination in November 2002 and that Mrs. Simmons again failed to show. R. at 229. The record does not indicate to which address the RO sent the notice of examination. In December 2002, the RO wrote her another letter, noting that she did not report to a scheduled VA medical examination in November 2002, again informing her of the potentially adverse impact on her claim for failing to report to a scheduled examination without good cause, and requesting the reasons for her failure to show. R. at 237. That letter was incorrectly addressed to "**[REDACTED]**." *Id.* (emphasis added). The record does not indicate the address to which that envelope containing that letter was sent.

In February 2003, the RO submitted to Mrs. Simmons a Supplemental Statement of the Case (SSOC), also incorrectly addressed to "**[REDACTED]**," informing her, among other things, that she forfeited her right to a VA medical exam by failing to appear twice for sched-

uled examinations, and based on the evidence previously obtained, her claim did not establish service connection. R. at 242-49 (emphasis added). In its June 2003 decision on appeal, the Board first concluded that VA had fully complied with its duty-to-assist and duty-to-notify requirements under the VCAA. As to her right-ear hearing loss claim, the Board concluded that without a VA medical examination, the evidence presented did not provide competent medical evidence of "linkage" between her military service and her right-ear hearing loss condition. R. at 8-10. In addition, as noted above, the Board concluded that with regard to Mrs. Simmons' left-ear hearing loss condition, the evidence presented did not warrant compensable service connection and therefore denied her increased-rating claim. R. at 10-11.

II. Contentions on Appeal

On appeal, Mrs. Simmons argues that the Court should reverse the March 2004 Board decision's findings regarding her right-ear hearing loss claim on the grounds that she entitled to service connection for that claim as a matter of law. Appellant's Brief (Br.) at 25. She asserts that the Board's findings with regard to her right-ear hearing loss claim are "clearly erroneous because her service medical records clearly document as increase in right-ear hearing loss in service." *Id.* at 18. She also asserts that her right-ear hearing loss was aggravated in service, that she is entitled to a presumption that her hearing loss was aggravated in service, and that no competent medical evidence in the record rebuts that presumption. *Id.* at 18-19. In addition, Mrs. Simmons contends that she was never properly notified of the November 2002 VA medical examination because such notification was not sent to her correct address. Appel-

lant's Reply Br. at 3-5. Furthermore, the appellant asserts that the Secretary failed to fulfill his duty-to-notify obligations under 38 U.S.C. § 5103(a) by not (1) identifying the information or evidence needed to substantiate her claim and (2) by not indicating which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary would attempt to obtain on behalf of the claimant. Appellant's Br. at 22.

In response, the Secretary filed a brief, asserting, inter alia, that the appellant's arguments are unsupported by the law and facts presented, and therefore, requests that the Court affirm the June 2003 Board decision. Secretary's Br. 24. As to the merits of Mrs. Simmons' right-ear hearing loss claim, the Secretary contends that the record provided a plausible basis for the Board's decision on the grounds that there was no medical evidence to demonstrate her contention that her right-ear hearing loss was related to her service-connected left-ear hearing loss disability, nor was there medical evidence demonstrating direct service connection. *Id.* at 10. The Secretary notes in his brief that because Mrs. Simons failed to report to her scheduled VA medical examination without good cause, the Board had authority pursuant to 38 C.F.R. § 3.655 (2004) to evaluate the claims based on the evidence currently existing in the record. *Id.* at 10-11. The Secretary also notes that the Court should not consider Mrs. Simmons' direct service-connection claim for her right-ear hearing loss because it was not raised below. *Id.* at 11. Alternatively, the Secretary contends that there is no competent medical evidence warranting a direct service-connection award for her right-ear hearing loss claim. As to the appellant's duty-to-notify argument, the Secre-

tary contends that the RO's communications, particularly its March 2001 VCAA notice letter, adequately informed the appellant of what evidence and information was necessary to substantiate her claim, and who was responsible for providing that evidence. *Id.* at 15-24.

III. Applicable Law and Analysis

A. Mrs. Simmons' Right-Ear Hearing Loss Claim

1. *Duty to Ensure Compliance with BVA Remand Orders*

"[A] remand by this Court or by the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand order." *Stegall v. West*, 11 Vet. App. 268, 271 (1998). This Court has further held that the Secretary, in fulfillment of his obligations under 38 U.S.C. § 303, is required to ensure compliance with the terms of the remand and that "where, as here, the remand orders of the Board or this Court are not complied with, the Board itself in failing to [ensure] compliance." *See id.* Such an error may constitute a basis for remand. See *id.* The Board must also provide an adequate statement of reasons or bases for its decision. *Gilbert v. Derwinski*, 4 Vet. App. 49, 56-57 (1990). An adequate statement of reasons or basis must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of any material evidence favorable to the veteran. *See* 38 U.S.C. § 7104(d)(1); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert* 1 Vet. App. At 56-57.

2. *Presumption of Regularity of Mailing*

There is a presumption of regularity under which it is presumed that government officials "have properly

discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926); *Ashley v. Derwinski*, 2 Vet. App. 307, 308 (1992); *see also Crain v. Principi*, 17 Vet. App. 182, 190 (2003) (noting that the Court has routinely applied this presumption of regularity and its caselaw regarding the mailing requiremetns under 38 U.S.C. § 7104(e) to RO mailings to VA claimants); *Jones v. West*, 12 Vet. App. 98, 100-02 (1998) (applying the presumption of regularity to notice of VA medical examinations). Because the RO mailed the notice to the appellant's last-known address, VA is presumed to have properly discharged its official duty to mail notice to the veteran of the November 2002 VA medical examination and, subsequently, notice of her failure to report. *See Crain*, 17 Vet. App. at 186; *Ashley*, 2 Vet. App. at 309 (concluding the mailing of notice of BVA decision pursuant to 38 U.S.C. § 7104(e) must be sent to claimant at claimant's last known address" of record). However, that presumption can be rebutted by submission of "clear evidence of the contrary." *Ashley*, 2 Vet. App. At 309 (citing *Rosler* v. *Derwinski*, 1 Vet. App. 241, 242 (1991); *see also YT v. Brown*, 9 Vet. App. 195, 199 (1996); *Mindenhall v. Brown*, 7 Vet. App. 271, 274 (1994). Where an appellant submits clear evidence to the effect that BVA's "regular" mailing practices are not regular or that the were not followed, the Secretary is no longer entitled to the benefit of the presumption, and the burden shifts to the Secretary to establish that the RO's communication was mailed to the veteran and veteran's representative, if any. *See Ashley, supra.*

3. *Application of Law to Facts*

In the instant case, the appellant asserts that "the incorrectly addressed RO letter of December 27, 2002,

is substantial evidence that VA did not mail appellant notification of the November 2002 VA examination to her correct address." Appellant's Br. at 5. This Court as held, on multiple occasions, that VA's use of an incorrect address for a claimant will constitute the "clear evidence" needed to rebut the presumption of regularity. Most recently, in *Crain*, this Court held that evidence showing a one-digit error in a ZIP Code in conjunction with the appellant's assertion of nonreceipt of the mailing of an SOC constituted sufficient evidence to rebut the presumption of regularity. *See Crain, supra*; *see also Flucker v. Brown*, 5 Vet. App. 296, 298 (1993) (finding clear evidence of an irregular mailing where the BVA decision was mailed to [**REDACTED**], whereas the appellant's correct address was [**REDACTED**]; *Piano v. Brown*, 5 Vet. App. 25, 26-27 (1993) (holding the Board's use of an incorrect address in mailing a copy of a BVA decision to the appellant constituted the clear evidence that was needed to rebut the presumption of regularity that the Board properly mailed notice of its decision to him at his last known address.

Consistent with the Court's decisions in *Crain*, *Flucker*, and *Piano*, all *supra*, a review of the record on appeal requires the Court to find that the appellant has not merely asserted, but has established with clear evidence that she did not receive the notification of her failure to report to a scheduled VA examination. As noted in the appellant's reply brief, after she had informed the RO of her change in address to "[**REDACTED**]," the RO's December 27, 2002, letter, notifying her that she failed to report to a scheduled VA examination, provides a mailing address of "[**REDACTED**]." R. at 237. The next RO communication in the record, a letter dated February 11, 2003, providing the veteran an SSOC, con-

tained the same incorrect address. R. at 242. Based on this evidence, and the Court's decision in *Crain, Flucker,* and *Piano*, all *supra*, the Court finds that the appellant has demonstrated with clear evidence, a mailing irregularity with regards to the RO's mailing of its notice to the veteran of the November 2002 VA medical examination and, subsequently, notice of her failure to report.

Because the Court holds that the presumption of regularity is rebutted, the burden shifts to the Secretary to establish that the December 2002 notice of failure to report to the scheduled VA examination was mailed to the appellant, or that the appellant actually received such notice. In his brief, the Secretary made no effort to carry that burden. In addition, the Board did not address this legal issue in its decision appeal. Therefore, the Board did not provide an adequate statement of reasons or bases for why Mrs. Simmons' right-ear hearing loss claim could be determined without the VA medical examination required by a prior BVA remand, and therefore, did not provide a precise basis for why it had complied with *Stegall*. Accordingly, the Court holds that remand is required for the Board to provide an adequate statement of reasons or bases with regards to these issues. In doing so, the board must ensure that a new VA medical examination is provided for Mrs. Simmons unless the Board must ensure that a new VA medical examination is provided for Mrs. Simmons unless the Board finds that there is "clear evidence" to demonstrate that the appellant was mailed to notice or there is proof of actual receipt of such information by the appellant, a finding the Court believes would be hard to justify based on a review of the record on appeal.

B. Mrs. Simons' Left-Ear Hearing Loss Claim

1. *VCAA Statutory-Notice Compliance*

With regard to her left-ear hearing loss claim, the appellant's only contention on appeal is that she was not provided statutorily adequate VCAA notice under section 5103(a). As amended by the VCAA, 38 U.S.C. § 5103(a) requires the Secretary to inform the claimant of (1) the information and evidence not previously provided to the Secretary that is necessary to substantiate the claim, (2) the portion of that information and evidence, if any, the claimant is expected to provide, and (3) the portion of that information and evidence, if any, the Secretary will attempt to obtain on behalf of the claimant. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002). In addition, this Court has held that 38 C.F.R. § 3.159(b)(1) (2004) imposes a fourth-notice element, the VA "request that the claimant provide any evidence in the claimant's possession that pertains to the claim." *Pelegrini v. Principi*, 18 Vet. App. 112, 121 (2004). Moreover, section 5103(a) and § 3.159(b)(1) notice requirements must be satisfied prior to an initial unfavorable decision by an agency of original jurisdiction (AOJ) on a claim such that the claimant has a "meaningful opportunity to participate effectively in the processing of his or her claim." *Mayfield v. Nicholson*, 19 Vet. App. 103, 122 (2005), *appeal docketed*, No. 05-7157 (Fed. Cir. June 14, 2005). Failure to comply with any of these requirements may constitute remandable error. *See id.* at 121-22; *Quartuccio*, 16 Vet. App. at 183. In the event that the Court finds such an error, it must "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2); *see Conway v. Principi*, 353 F.3d 1369,

1374-75 (Fed. Cir. 2004); *Mayfield*, 19 Vet. App. at 111-12.

As noted above, under the first-statutory element of section 5103(a), the Secretary is required to inform the claimant of the information and evidence not of record, if any, that is necessary to substantiate his or her claim. 38 U.S.C. § 5103(a). In the context of an increased-rating claim, this Court has noted that "[w]here entitlement to compensation has already been established an increase in the disability rating is at issue, the present level of disability is a primary concern." *Francisco v. Brown*, 7 Vet. App. 55, 58 (1994). Here, the Board concluded in its June 2003 decision that VA had fulfilled its duty-to-notify obligations to the appellant, noting that "[i]n a March 2001 letter, she was notified what evidence she needed to submit in order to substantiate her claims, and what evidence VA would obtain." R. at 3. A review of that letter, and the entire record on appeal, however, fails to reflect that VA properly carried out its notice requirements.

In accordance with this Court's jurisprudence, Mrs. Simmons should have been informed of the evidentiary prerequisites for establishing an increased-rating claim. However, the March 2001 letter did not inform her of that critical information. Rather, under the heading "What Must The Evidence Show to Establish Entitlement?," the March 2001 VCAA notice letter wrongfully informed Mrs. Simmons that she needed to submit evidence establishing the three elements of service connection, evidence she submitted, and a status her claim had previously been awarded since November 1980. R. at 67. Although that letter clearly pertained to her increased-rating claim, that letter failed to inform her

(1) that an increase in severity of her service-connected condition was required and (2) what types of evidence or information was needed, or could be submitted to establish that claim. Therefore, the Board erred in its findings that VA had complied with the first statutory-notice element of the VCAA. In addition, the RO's efforts to satisfy the obligation to inform the veteran as to who would be obligated to provide or seek to obtain which evidence was similarly unsuccessful because those requirements cannot be fulfilled until the first-notice element was satisfied. Accordingly, neither the March 2001 letter nor any other document in the record provided Mrs. Simmons with notice that complied fully with the charges in the law brought about the VCAA. *See Mayfield* and *Quartuccio*, both *supra*.

2. *Prejudicial Error Analysis*

Having found a notice error, the Court must now "take due account of the rule of prejudicial error". 38 U.S.C. § 7261(b)(2) (as amended by Veterans Benefits Act of 2002 (VBA), § 401, Pub. L. No. 107-330, 116 Stat. 2820, 2832); *see Conway*, 353 F.3d at 1374-75. Here, the Court has found that VA failed to comply with all three elements of its statutory-notice requirement under the VCAA. However, because the appellant has not asserted with any specificity how she was prejudiced as a result of non-compliance with the second and third-notice elements, the Court will only address the issue of whether the Secretary committed prejudicial error by not informing the appellant of the information and evidence necessary to substantiate her claim. *See Mayfield*, 19 Vet. App. at 120-24 (noting that except for non-compliance with the first statutory-notice element, which has the "natural effect of producing prejudice, for

the burden of persuasion to shift to the Secretary, the appellant must identify, "with considerable specificity," how the notice was defective, and, what evidence the appellant would have produced or requested the Secretary to obtain had the secretary fulfilled his notice obligations).

As to the first statutory-notice element, the Court in *Mayfield* held that such an error constitutes a VA failure to "provide a key element of what it takes to substantiate her claim thereby precluding her from participating effectively in the processing of her claim, which would substantially defeat the purpose of section 5103(a) notice". *Mayfield*, 19 Vet. App. at 122. Accordingly, because that notice error is such that it would have "the natural effect of producing prejudice," the burden shifts to the Secretary to demonstrate "that there was clearly no prejudice" to the appellant from the notice error in terms of the fairness of the adjudication. *Id.* at 121. As to how the Secretary may meet this burden, this Court held in *Mayfield*.

> [T]he Secretary must demonstrate a lack of prejudice by persuading the Court that the purpose of the notice was not frustrated—e.g., by demonstrating (1) that any defect in notice was cured by actual knowledge on the part of the appellant that certain evidence (i.e., missing information or evidence needed to substantiate the claim) was required and that she should have provided it, or (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not possibly have been awarded as a matter of law.

Id. (citation omitted).

Here, reviewing the record as a whole, the Court cannot conclude that the notice error was nonprejudicial. First, after reviewing the record in its entirety, the Court can find no evidence that Mrs. Simmons had actual knowledge of what evidence was necessary to substantiate her claim. Additionally, as noted above, the record on appeal provides no indication that a reasonable person would have understood, from the notice provided, the information or evidence needed to substantiate her claim. Moreover, the Court cannot say that as a matter of law, with proper notice, Mrs. Simmons could not have obtained a private examination substantiating her claim. *See Short Bear v. Nicholson*, 19 Vet. App. 341 (2005) (Hagle, J., concurring) (noting that the operation of law bases for allowing the Secretary to meet his burden should be utilized only when there are "no immutable fact[s] that disqualify" an appellant from entitlement to their claim). On the basis of the foregoing analysis and because the Court can find no additional reason for holding that the first-notice error here was nonprejudicial to Mrs. Simmons, the Court holds that remand is required for her left-ear hearing loss claim as well as for VA to comply with its duty-to-notify requirements.

IV. Conclusion

On the basis of the foregoing analysis, the record on appeal, and the parties' pleadings, and having "take[n] due account of the rule of prejudicial error" pursuant to 38 U.S.C. § 7261(b)(2), the Court vacates the June 3, 2003, BVA decision and remands the matter for expeditious further development and issuance of an readjudicated decision supported by an adequate statement of reasons or bases consistent with this opinion and in accordance with 38 U.S.C. § 7112 (as added by the Veter-

ans Benefits Act of 2003, Pub. L. No. 108-183, § 707(b), 117 Stat. 2651, 2673) (requiring Secretary to "take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court"); *see Vargas-Gonzalez v. Principi*, 15 Vet. App. 222, 225-30 (2001) (holding that section 302 of the Veterans' Benefits Improvements Act applied to all elements of a claim remanded by Court or Board), and in accordance with all applicable law and regulation. *See Allday v. Brown*, 7 Vet. App. at 533-34. On remand, the appellant will be free to submit additional evidence and argument. *See Kay v. Principi*, 16 Vet. App. 529, 534 (2002). A remand by this Court or by the Board confers on an appellant the right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *See Stegall*, 11 Vet. App. at 271. A final decision by the Board following the remand herein ordered will constitute a new decision that, if adverse, may be appealed to this Court only upon the filing of a new Notice of Appeal with the Court no later than 120 days after the date on which notice of the Board's new final decision is mailed to the appellant. *See Marsh v. West*, 11 Vet. App. 468 (1998).

VACATED and REMANDED.

DATED: [Dec. 1, 2005]

APPENDIX H

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

Docket No. 99-22-149A
SS 046 62 3412

IN THE APPEAL OF PATRICIA D. SIMMONS

Date: [June 3, 2003]

On Appeal from the
Department of Veterans Affairs Regional Office in
Winston-Salem, North Carolina

THE ISSUES

1. Entitlement to service connection for right ear hearing loss.
2. Entitlement to a compensable rating for left ear hearing loss.

REPRESENTATION

Appellant represented by North Carolina Division of Veterans Affairs

ATTORNEY FOR THE BOARD

R. A. Seaman, Associate Counsel

INTRODUCTION

The appellant is a veteran who had active service from December 1978 to April 1980. This matter comes before the Board of Veterans' Appeals (the Board) on appeal from an August 1998 rating decision of the Department of veterans Affairs (VA) Regional Office (RO) in Winston Salem, North Carolina. The case was before the Board in February 2001, when it was remanded for further development.

FINDINGS OF FACT

1. The veteran's right ear hearing loss disability was not manifested in service or to a compensable degree in the first postservice year, and there is no competent evidence relating it to service or to her service-connected left ear hearing loss.

2. The veteran's left ear hearing acuity is no worse than Level VI.

CONCLUSIONS OF LAW

1. Service connection for right ear hearing loss is not warranted. 38 U.S.C.A. §§ 1110, 1112, 1113, 1131, 1137, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.304, 3.307, 3.309, 3.310 (2002).

2. A compensable rating for left ear hearing loss is not warranted. 38 U.S.C.A. §§ 1155, 5107 (West 2002); 38 C.F.R. § 4.85, Diagnostic Code (Code) 6100, Tables VI and VII, § 4.86 (2002).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

There has been a significant change in the law during the pendency of this appeal. On November 9, 2000, the

Veterans Claims Assistance Act of 2000 (VCAA), (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107 (West 2002)) became law. Regulations implementing the VCAA have been published. 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.32(a) (2002). The VCAA and implementing regulations apply in the instant case. See VAOPGCPREC 11-2000.

There has been substantial compliance with the pertinent mandates of the VCAA and implementing regulations. The case has been considered on the merits, and well-groundedness is not an issue. In the August 1998 decision, in an October 1999 statement of the case, and in supplemental statements of the case issued in October 2000 and February 2003, the veteran was notified of the evidence necessary to substantiate her claims, and of what was of record. In a March 2001 letter, she was notified what evidence she needed to submit in order to substantiate her claims, and what evidence VA would obtain. The letter clearly explained that VA would make reasonable efforts to help the veteran get pertinent evidence, but that she was responsible for providing sufficient information to VA to identify the custodian of any records. *See Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

The veteran was accorded VA examinations in 1999, 2001, and August 2002. She failed (without explanation) to report for a VA audiological examination to determine the etiology of her right ear hearing loss scheduled in November 2002. Correspondence from the RO to the veteran, sent to her last known address, has not been returned as undeliverable.

The Board notes that the "duty to assist" the veteran in the development of facts pertinent to her claim is not a "one-way street." *See Wood v. Derwinski*, 1 Vet. App. 190 (1991). The veteran must also be prepared to meet her obligations by cooperating with VA's efforts to provide an adequate medical examination and submitting to the Secretary all medical evidence supporting a claim. *Olson v. Principi*, 3 Vet. App. 480 (1992).

The RO has obtained the veteran's service medical records and all identified records from postservice medical care providers, and she has been accorded VA examinations. There is no indication that there is any relevant evidence outstanding, and nothing to suggest that another examination is indicated. Development is complete to the extent possible; VA's duties to notify and assist, including those mandated by the VCAA, are met.

Background

By a November 1980 decision, the RO granted service connection for left-ear hearing loss, rated noncompensable. Essentially, the veteran maintains that her left ear hearing loss is sufficiently disabling to warrant a compensable rating. She further contends that service connection is warranted for right, ear hearing loss, as she now has such hearing loss that is causally related to her service-connected left ear hearing loss.

Service medical records show that on March 1978 examination prior to induction, audiometric studies showed that puretone thresholds, in decibels, were:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	20	5	5	5	5
LEFT	35	20	35	25	15

In a March 1980 hearing conservation consultation report, it was noted that the veteran worked in a noisy environment during service, and audiometric examination on her entry to active duty had revealed she had left ear hearing loss that preexisted service. On March 1980 examination for separation from service the diagnosis was high and low frequency hearing loss in the left ear. Audiometric studies showed that puretone thresholds, in decibels, were:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	15	10	5	5	15
LEFT	35	35	45	30	30

Postservice private medical records include a September 1980 letter from a clinical audiologist who reported that private audiometric studies in August 1989 showed essentially normal hearing in the right ear and severe to profound hearing loss in the left ear. It was noted that

the left ear hearing loss appeared to be predominantly conductive in nature, but had some sensorineural component.

On March 1998 VA audiological evaluation, audiometry revealed the puretone thresholds, in decibels, were:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	45	45	40	45	40
LEFT	75	75	70	75	85

The examiner reported that the veteran's right ear hearing was normal in 1989, but currently showed right ear hearing loss with a significant conductive component. Other VA outpatient reports indicate diagnosis of bilateral mixed-type hearing loss, (greater in the left ear), and further indicate that surgery was recommended.

On VA audiological evaluation in June 1999, the veteran reported that she experienced noise exposure in service launching aircraft while working on the flight line. She stated that she could not hear unless she was looking at the person speaking. Audiometry revealed that puretone thresholds, in decibels, were:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	65	55	45	45	45
LEFT	85	65	60	70	80

Speech audiometry revealed speech discrimination ability of 96 percent correct in the right ear and 72 percent correct in the left ear. The average puretone thresholds for the 1000, 2000, 3000, and 4000 Hertz frequencies were 48 decibels in the right ear and 69 decibels in the left ear. The diagnosis was moderate to severe mixed hearing loss in the right ear, and moderately-severe to severe mixed hearing loss in the left ear. The examiner recommended an otologic evaluation because the veteran's mixed-type hearing loss was suggestive of middle ear pathology.

A report of private audiometric examination in August 2000 shows a diagnosis of moderate, mixed-type right ear hearing loss, and severe mixed-type left ear hearing loss, with absent acoustic reflexes bilaterally. It was noted that the veteran needed new hearing aids for both ears. A report of private audiometric examination in May 2001 again shows a diagnosis of moderate, mixed-type right ear hearing loss, and moderate to severe mixed-type left ear hearing loss. It was noted that the veteran opted to not undergo surgery for her hearing loss.

In February 2001, the Board remanded the veteran's claims for a VA examination to determine the nature and etiology of her right ear hearing loss, and the current severity of her left. ear hearing loss.

In a letter received in May 2001, the veteran's sister reported that the veteran has difficulty hearing even with the use of hearing aids. She served as the veteran's "ears" during phone calls, meetings, and court appearances. Hearing aids provided the veteran some hearing ability, but she still relied on lip reading. The sister re-

ported that she herself had perfect hearing, as did their four siblings.

On VA audiological evaluation in July 2001, the veteran again expressed that she sustained acoustic trauma in service due to noise exposure from aircraft engines. She stated that she had to watch faces to understand speech, and had difficulty speaking on the phone. Audiometry revealed that puretone thresholds, in decibels, were:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	50	45	45	45	40
LEFT	70	65	65	80	85

Speech audiometry revealed speech discrimination ability of 92 percent correct in the right ear and 74 percent correct in the left ear. The average puretone thresholds for the 1000, 2000, 3000, and 4000 Hertz frequencies were 44 decibels in the right ear and 73 decibels in the left ear. The diagnosis was mild to moderate mixed-type hearing loss in the right ear, and moderately-severe mixed-type hearing loss in the left ear. The examiner reported that the overall audiometric pattern was consistent with middle ear pathology, "i.e., ossicular fixation, . . . and suggestive of otosclerosis, bilaterally."

On VA audiological evaluation in August 2002, audiometry revealed that puretone thresholds, in decibels, were:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	55	50	45	45	35
LEFT	65	65	60	75	85

Speech audiometry revealed speech discrimination ability of 92 percent correct in the right ear and 74 percent correct in the left ear. The average pure tone thresholds for the 1000, 2000, 3000, and 4000 Hertz frequencies were 44 decibels in the right ear and 71 decibels in the left ear. The examiner noted that the VA audiological examination in July 2001 had revealed mild to moderate right ear hearing loss, and moderately-severe to severe hearing loss in the left ear. The examiner opined that the results of VA audiological examination in July 2001 were most consistent with bilateral ossicular fixation and suggestive of otosclerosis. It was noted that "[r]esults obtained today indicated essentially no change in hearing levels and speech recognition scores as reported on [the July 2001] examination."

Legal Criteria and Analysis—Service Connection

Service connection may be granted for disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110, 1131; 38 C.F.R. §§ 3.303, 3.304. Service connection may also be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303. A disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. 38 C.F.R. § 3.310(a).

In order to prevail on the issue of service connection, there must be medical evidence of a current disability; medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. *See Hickon* v. *West*, 12 Vet. App. 247 (1999).

In the case of any veteran who served on active duty for ninety days or more and a chronic disease, to include sensorineural hearing loss (an organic disease of the nervous system), becomes manifest to a degree of ten percent or more within one year from the date of separation from such service, such disease shall be presumed to have been incurred in or aggravated by service notwithstanding that there is no record of evidence of such disease during the period of service. 38 U.S.C.A. §§ 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309.

For purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when the auditory thresholds in any of the frequencies 500, 1,000, 2,000, 3,000, or 4,000 Hertz is 40 decibels or greater; or when the, auditory threshold for at least three of the frequencies, 500, 1,000, 2,000, 3,000, or 4,000 are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent. 38 C.F.R. § 3.385 (2002).

When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination, and a claimant, without good cause, fails to report for such examination, or reexamination, (1) in an, original compensation claim; the claim shall be rated based on the evidence of record;

(2) in any other original claim, a reopened claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied. 38 C.F.R. § 3.655 (2002). In this case, the appeal of the service connection issue is from a decision on an original claim. Hence, the Board has no alternative but to base the decision of that issue on the evidence of record. 38 C.F.R. § 3.655.

When there is an approximate balance of positive and negative evidence regarding the merits of an issue materials to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107(b).

A right ear hearing loss disability was not manifested in service; sensorineural hearing loss was not manifested to a compensable degree in the first postservice year; and there is no competent evidence that relates the veteran's right ear hearing loss to service or to any noise exposure therein. Accordingly, direct service connection for right hearing loss (or on a presumptive basis) is not warranted.

The veteran's theory of entitlement to service connection for right ear hearing loss disability is essentially that such disability is secondary to her service-connected left ear hearing loss. However, there is no competent evidence of such linkage. VA physicians have not found that there is such a relationship, and the veteran has not submitted any competent (medical) evidence to that effect (or indicated that any such evidence exits). Furthermore, she has not cooperated with further VA assistance efforts; she has failed to report for VA examination scheduled to ascertain the etiology of the right ear hearing loss.

Without competent evidence of a nexus between the current right ear hearing loss and service or between right ear hearing loss disability and the service-connected left ear hearing loss, service connection for right ear hearing loss is not warranted. *See Hickson*, 12 Vet. App. at 253. The Board has reviewed the veteran's contentions, and those of her sister. Their statements to the effect that her right ear hearing loss is related to acoustic trauma in service or to her service-connected left ear hearing loss cannot by themselves establish that this is so. They are lay persons and, as such, are not competent in matters requiring specialized medical knowledge, skill, training, or education. *Espiritu v. Derwinski*, 2 Vet. App. 492 (1992).

The doctrine of resolving reasonable doubt in the veteran's favor does not apply in this case as the preponderance of the evidence is against her claim of service connection for right ear hearing loss.

Legal Criteria and Analysis—Increased Rating

Disability ratings are determined by application of a schedule of ratings, based on average impairment of earning capacity. Separate diagnostic codes identify the various disabilities. 38 U.S.C.A. § 1155; 38 C.F.R., Part 4. In regard to any request for an increased schedular evaluation, the Board will only consider the factors enumerated in the applicable rating criteria. *Massey v. Brown*, 7 Vet. App. 204 (1994).

In a claim for an increased rating, the present level of disability is of primary concern; the regulations do not give past medical reports precedence over current findings. *Francisco v. Brown*, 7 Vet. App. 55 (1994). Where there is a question as to which of two evaluations apply,

the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

If impaired hearing is service-connected in only one ear, as in this case, in order to determine the percentage evaluation from Table VII, the nonservice-connected ear will be assigned to Roman Numeral designation for impairment of I, subject to the provisions of 38 C.F.R. § 3.383 (2002).

When findings on audiometric studies (most notably on VA examinations in July 2001 and August 2002) are compared to Table VI of the rating schedule, the results are that the veteran has no worse than Level VI hearing in the left. Under 38 C.F.R. § 4.85, Table VII, Code 6100, such hearing acuity warrants a noncompensable rating (a compensable (10 percent) rating for a unilateral service connected hearing loss requires Level X or XI hearing acuity). An exceptional pattern of hearing (as specified in 38 C.F.R. § 4.86), which would permit rating under alternate criteria, is not shown. Consequently, the schedular criteria do not allow for a compensable rating in this case. The matter of an extraschedular rating under 38 C.F.R. § 3.321 has not been raised specifically. The Board's review of the evidence did not disclose any evidence of factors such as frequent hospitalizations or marked interference of employment due to the left ear hearing loss disability which would raise the matter of an extraschedular rating.

As noted above, rating hearing loss disability requires a mechanical application of audiometry findings to the schedular criteria, which here results in a noncompen-

sable rating. See *Lendenmann v. Principi*, 3 Vet. App. 345 (1992). Accordingly, the claim of entitlement to a compensable rating for left ear hearing loss must be denied.

ORDER

Service connection for right ear hearing loss is denied.

A compensable rating for left ear hearing gloss is denied.

/s/ GEORGE R. SENYK
GEORGE R. SENYK
Veterans Law Judge, Board of
Veterans' Appeals

APPENDIX I

1. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 38 U.S.C. 5103 (2000 & Supp. V 2005) provides in pertinent part:

Notice to claimants of required information and evidence

(a) REQUIRED INFORMATION AND EVIDENCE.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

3. 38 U.S.C. 7261 (2000 & Supp. V 2005) provides in pertinent part:

Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

OPPOSITION BRIEF

92

No. 07-1209

FILED
MAY 12 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JAMES B. PEAKE, M.D.,

Petitioner,

v.

WOODROW F. SANDERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

MARK R. LIPPMAN
THE VETERANS LAW GROUP
8070 La Jolla Shores Drive
#437
La Jolla, CA 92037
858-456-5840

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the government (as opposed to disabled veterans and other claimants of the Veterans Disability Adjudication System) should bear the burden of proof on the issue of prejudicial error in connection with a notice violation under U.S.C. § 5103(a).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

Respondent requests that the Court deny the petition and leave in place of the judgment of the United States Court of Appeals for the Federal Circuit. The decision below should be left undisturbed as it correctly holds that the government bears the burden of proof to establish the harmlessness of a defective notice under 38 U.S.C. § 5103(a). Respondent maintains that law and policy support the lower court's decision.

I. The Decision of the Court of Appeals for the Federal Circuit Is Consistent with Supreme Court Authority

Petitioner maintains that the Federal Circuit's interpretation of the rule of prejudicial error is inconsistent with the uniform construction of the rule established by other courts of appeal and the Supreme Court. *Cert. Pet.* at 9-14.

Petitioner is wrong. *O'Neal v. McAninch*, 513 U.S. 432 (1995) stands for the proposition that, in the context of civil cases, the government bears the burden of proof on the issue of prejudicial error. To be sure, *O'Neal* is predicated, in part, upon the distinction between civil and criminal proceedings:

> Unlike the civil cases cited by the State, the errors being considered by a habeas court

> occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake. And, as we have explained, when reviewing errors from a criminal proceeding, this Court has consistently held that, if the harmlessness of the error is in grave doubt, relief must be granted. We hold the same here.

513 U.S. at 440.

But *O'Neal* rests upon an alternate ground; thus, it stands for a separate proposition. *Com. of Mass. v. U.S.*, 333 U.S. 611, 623 (1948); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (an opinion based upon two independent grounds is stare decisis as to both grounds). *O'Neal* said that, notwithstanding the different issues at stake in criminal and civil proceedings, the standard for "grave doubt" – i.e., the burden of showing prejudice – should apply the same way in both a civil and criminal context:

> Moreover, precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights. In *Kotteakos*, the Court interpreted the then-existing harmless-error statute, 28 U.S.C. § 391, now codified with minor change at 28 U.S.C. § 2111. . . . That statute, by its terms, applied to both civil and criminal cases, and *Kotteakos* made no distinction, at least with respect to the question at issue here, between the two types of

> cases. . . . And, more important for present purposes, the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to § 391 as their statutory sources. . . . In fact, in recent cases, we have interpreted the nearly identical language of Rule 52(a) as treating instances of grave doubt just as we treat them here. . . . For these reasons, **even if, for argument's sake, we were to assume that the civil standard for judging harmlessness applies to habeas proceedings (despite the fact that they review errors in state *criminal* trials), it would make no difference with respect to the matter before us. For relevant authority rather clearly indicates that, either way, the courts should treat similarly the matter of "grave doubt" regarding the harmlessness of errors affecting substantial rights, and as *Kotteakos* provides**.

513 U.S. at 441-442, bold added.

Indeed, the dissenting opinion in *O'Neal* read the Court's holding as placing the burden of proof on the government on the harmless error issue in civil cases:

> *Palmer*[1] held that the party seeking relief from a judgment because of an erroneous ruling "carries the burden of showing that

---

[1] *Palmer v. Hoffman*, 318 U.S. 109 (1943).

> prejudice resulted"; it did not say that only those challenging "technically" erroneous rulings were so encumbered. (Citation). Accordingly, most of the Courts of Appeals that have considered the issue place the burden of showing prejudice on the civil appellant, just as *Palmer* did. . . .
>
> The Court concludes that *Palmer* and these cases may be disregarded because the federal harmless-error statute, 28 U.S.C. § 2111, makes no distinction between civil and criminal cases; *since the rule in the criminal context places the burden of persuasion on the government, the Court decides that the same should be true in the civil context.* . . .

Id. at 449-50 (dis. opn., J., Thomas), italics added; *see Obrey v. Johnson*, 400 F.3d 691, 700 (9th Cir. 2005).

II. The Decision of the Court of Appeals for the Federal Circuit Is in Line with the Uniquely Informal & Pro-claimant Character of the VA System

Petitioner claims that the Federal Circuit's interpretation of the rule of prejudicial error under 38 U.S.C. § 7261(b)(2) must be construed in the same manner as the rule of prejudicial error set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 706. *Cert. Pet.* at 14-23.

Respondent disagrees. Specifically, the rule of prejudicial error under § 7261(b)(2) cannot be divorced from the VA's uniquely pro-claimant system. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed.Cir. 1998)

("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant. (Citations omitted).").

As the lower court explained, placing the burden on claimants to establish prejudice would undermine the benevolent and informal nature of the VA system:

> The Veterans Court, however, took Congress's clear desire to create a framework conducive to efficient claim adjudication and instead created a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process and assure him or herself of a fair adjudication.

Appendix at 16a; *see Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985) ("A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. This is not to say that complicated factual inquiries may be rendered simple by the expedient of informality, but surely Congress desired that the proceedings be as informal and nonadversarial as possible.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK R. LIPPMAN
THE VETERANS LAW GROUP
8070 La Jolla Shores Drive
#437
La Jolla, CA 92037
858-456-5840

OPPOSITION BRIEF

(3)
FILED
MAY 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1209

IN THE

Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, *Petitioner*,

v.

WOODROW F. SANDERS, *Respondent.*

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, *Petitioner*,

v.

PATRICIA D. SIMMONS, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SIMMONS

DOUGLAS J. ROSINSKI
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1320 Main Street
Columbia, SC 29201
(803) 252-1300

SEAN A. RAVIN
2800 Quebec Street, NW
Washington, DC 20008
(202) 607-5731

CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
MEGAN BARBERO
MATTHEW T. JONES
CATHERINE A. MARLANTES
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

QUESTION PRESENTED

Whether the court of appeals erred in holding that when the Department of Veterans Affairs (VA) fails to provide statutorily required notice to benefits claimants, the VA should bear the burden of showing that such an error was not prejudicial.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

A. Statutory Background 3

B. Factual And Procedural History 4

REASONS FOR DENYING THE PETITION 7

I. THE APA RULE OF PREJUDICIAL ERROR IS FLEXIBLE AND CONTEXT-SPECIFIC 8

II. GIVEN THE IMPORTANCE OF THE VCAA NOTICE REQUIREMENTS TO THE PRO-CLAIMANT VETERANS BENEFITS SYSTEM, THE FEDERAL CIRCUIT PROPERLY ALLOCATED THE PREJUDICIAL ERROR BURDEN OF PROOF TO THE AGENCY 11

III. THE CONSEQUENCES OF THE FEDERAL CIRCUIT'S APPROACH ARE NOT PROBLEMATIC 18

IV. EVEN IF THE QUESTION PRESENTED WARRANTS REVIEW, THE COURT SHOULD NOT GRANT REVIEW IN THESE CASES 21

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Page(s)

Brown v. *Gardner*, 513 U.S. 115 (1994) 15

City of Sausalito v. *O'Neill*, 386 F.3d 1186 (9th Cir. 2004) 10

Clark v. *Peake*, No. 05-2422, 2008 WL 852588 (Vet. App. Mar. 24, 2008) 19

District of Columbia v. *Carter*, 409 U.S. 418 (1973) 15

Doe v. *Hampton*, 566 F.2d 265 (D.C. Cir. 1977) 9

Doolin Security Savings Bank v. *Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998) 17

Garrison v. *Nicholson*, 494 F.3d 1366 (Fed. Cir. 2007) 22

General Dynamics Land Systems, Inc. v. *Cline*, 540 U.S. 581 (2004) 15

Gifford Pinchot Task Force v. *U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) 9, 10

Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970) 9

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 21

Hodge v. *West*, 155 F.3d 1356 (Fed. Cir. 1998) 12

Holliday v. *Principi*, 14 Vet. App. 280 (2001), *overruled on other grounds by Kuzma* v. *Principi*, 341 F.3d 1327 (Fed. Cir. 2003) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Holmes v. *Peake*, No. 06-0852, 2008 WL 974728 (Vet. App. Apr. 3, 2008) 19

Intercargo Insurance Co. v. *United States*, 83 F.3d 391 (Fed. Cir. 1996) 11

Jaquay v. *Principi*, 304 F.3d 1276 (Fed. Cir. 2002) 12

Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982) 10, 11, 14

Kent v. *Nicholson*, 20 Vet. App. 1 (2006) 13

Keyes v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973) 14

King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991) 15

Kotteakos v. *United States*, 328 U.S. 750 (1946) 16, 17

Mayfield v. *Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006) 4, 13, 14, 20

Mayfield v. *Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006) 13

McLouth Steel Products Corp. v. *Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) 9, 14

Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 16

Morton v. *West*, 12 Vet. App. 477 (1999) 20

National Organization of Veterans' Advocates v. *Secretary of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Natural Resources Defense Council v. *U.S. Forest Service*, 421 F.3d 797 (9th Cir. 2005) 10

Nevada v. *Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006) 8

New York Public Interest Research Group v. *Whitman*, 321 F.3d 316 (2d Cir. 2003) 11

Nolen v. *Gober*, 222 F.3d 1356 (Fed. Cir. 2000) 12

O'Neal v. *McAninch*, 513 U.S. 432 (1995) 16, 17

PDK Laboratories Inc. v. *DEA*, 362 F.3d 786 (D.C. Cir. 2004) 8

Riverbend Farms, Inc. v. *Madigan*, 958 F.2d 1479 (9th Cir. 1992) 9

Sierra Club v. *U.S. Fish & Wildlife Service*, 245 F.3d 434 (5th Cir. 2001) 10

Sprint Corp. v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003) 10

Strock v. *Peake*, No. 05-3560, 2008 WL 566394 (Vet. App. Feb. 7, 2008) 19

U.S. Steel Corp. v. *EPA*, 595 F.2d 207 (5th Cir. 1979) 10

Virginia Military Institute v. *United States*, 508 U.S. 946 (1993) 21

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 12

STATUTES

5 U.S.C. § 706(2) 8

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1254(1) 2

38 U.S.C.
§ 5102(b) 3
§ 5103(a) 2, 3, 14
§ 5103A(a)(1) 3
§ 5107(b) 3, 13
§ 7252(a) 3
§ 7261(b)(2) 2, 3
§ 7292(c) 4
§ 7292(d)(2) 22

Pub. L. No. 100-687, 102 Stat. 4105 (1988) 13

LEGISLATIVE MATERIALS

H.R. Rep. No. 65-913 (1919) 16

H.R. Rep. No. 105-52 (1997) 3, 12

H.R. Rep. No. 106-781 (2000) 20, 21

H.R. Rep. No. 100-963 (1988) 12

OTHER AUTHORITIES

Attorney General's Manual on the Administrative Procedure Act (1947) 17

Berger, Raoul, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137 (1967) 8

Gressman et al., *Supreme Court Practice* (9th ed. 2007) 21

United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited May 15, 2008) 18, 20

In the Supreme Court of the United States

No. 07-1209

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, *Petitioner*,

v.

WOODROW F. SANDERS, *Respondent.*

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, *Petitioner*,

v.

PATRICIA D. SIMMONS, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SIMMONS

Respondent Patricia Simmons files this brief in opposition to the petition for a writ of certiorari filed by James B. Peake, M.D., Secretary of Veterans Affairs.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-64a) is reported at 487 F.3d 892. The order denying the petition for rehearing and rehearing en banc (Pet. App. 65a-66a) is unreported. The decision of the United

States Court of Appeals for Veterans Claims (Pet. App. 67a-82a) is unreported.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Veterans Claims Assistance Act of 2000 provides in relevant part:

> **Notice to claimants of required information and evidence**
>
> (a) Required information and evidence.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

2. The Veterans' Judicial Review Act provides that the United States Court of Appeals for Veterans Claims shall "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2).

STATEMENT

A. Statutory Background

1. Congress has observed that the claim system of the Department of Veterans Affairs (VA) "is unlike any other adjudicative process," in that "[i]t is specifically designed to be claimant friendly." H.R. Rep. 105-52, at 2 (1997). By statute, the VA is required to assist veterans who submit a claim for benefits. *See, e.g.*, 38 U.S.C. § 5103A(a)(1). Detailed statutory notice requirements are part of this assistance. Pursuant to the Veterans Claims Assistance Act of 2000 (VCAA), the Secretary must provide the claimant with notice of the "information necessary to complete the application." *Id.* § 5102(b). In addition, the Secretary must notify the claimant of any additional information or evidence necessary to substantiate the claim, as well as which portion of that information the Secretary will attempt to obtain on the claimant's behalf. *Id.* § 5103(a). In reviewing claims, moreover, the VA must give the benefit of the doubt to the veteran whenever "there is an approximate balance of positive and negative evidence." *Id.* § 5107(b).

2. A veteran first presents a claim for benefits to a regional office of the VA, and can appeal an adverse decision of the office to the Board of Veterans Appeals (Board). The decisions of the Board are subject to review exclusively in the United States Court of Appeals for Veterans Claims (Veterans Court). *See* 38 U.S.C. § 7252(a). On review, the Veterans Court shall "take due account of the rule of prejudicial error." *Id.* § 7261(b)(2). The Federal Circuit, in turn, has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" by the Veterans Court. *Id.* § 7292(c).

3. In 2005, the Veterans Court issued an opinion that addressed the prejudicial error provision, Section 7261(b)(2), in the context of the notice requirements of the VCAA. *Mayfield* v. *Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006). The court held that when the VA fails to notify the claimant of the information and evidence necessary to substantiate his or her claim (a "first-element" notice error), the VA bears the burden of demonstrating that there was no prejudice to the appellant from that error, given that such an error has "the natural effect of producing prejudice." *Id.* at 122. But when the VA fails to comply with the additional statutory notice requirements, the Veterans Court held, the claimant has the burden of showing that the error prejudiced the proceeding by affecting its essential fairness. *Id.* at 122-123.

B. Factual And Procedural History

1. Respondent Patricia Simmons served in the United States Navy from 1978 to 1980. Pet. App. 68a.[1] In 1980, she filed with a VA regional office an application for VA disability benefits for hearing loss in her left ear caused by her constant exposure, while on active duty, to a noisy work environment. *Id.* The regional office denied her claim, finding that the disability was not severe enough to be compensable, *id.* at 68a, 86a, and the Board affirmed, *id.* at 68a-69a.

In March 1998, Simmons requested that the regional office amend her claim to include right-ear hear-

---

[1] Respondent has married and is now known as Patricia White. In order to avoid confusion, she is referred to in this brief in opposition as Patricia Simmons.

ing loss. Pet. App. 69a. The regional office denied the claim on the ground that the right-ear hearing loss was unconnected to Simmons's service in the Navy. *Id.* The Board remanded for a determination whether the right-ear hearing loss was related to her left-ear hearing loss, and to enable the VA to comply with the requirements of the VCAA. *Id.* at 69a, 89a.

On remand, in 2001, the regional office sent a letter to Simmons purporting to provide the notice required by the VCAA. Pet. App. 69a. The VA also scheduled medical examinations for Simmons, which she missed. *Id.* at 69a-70a. Subsequently, the regional office denied her claim. *Id.* at 70a-71a. On appeal, the Board affirmed, concluding that the VA had "substantial[ly]" complied with its obligations under the VCAA, and denied her claim. *Id.* at 85a, 95a-96a.

Simmons appealed to the Veterans Court, which vacated the Board's decision and remanded her claim for re-adjudication. Pet. App. 81a. It concluded that the VA had failed to comply with the VCAA's first-element notice requirement (*i.e.*, providing notice of the information necessary to substantiate her claim), as well as the other notice requirements. *Id.* at 79a. Citing *Mayfield*, the court held that the VA had the burden of proving that the first-element notice error did not prejudice Simmons. *Id.* at 80a-81a. The court also concluded that remand was required to provide a new medical examination unless there was clear evidence that Simmons received notice relating to the exams (one of which, it appears, had been sent to the wrong address). *Id.* at 69a-70a, 76a. The VA appealed to the Federal Circuit.

2. On the same day that the Federal Circuit decided *Simmons*, the court issued its decision in *Sanders*

v. *Nicholson*. Pet. App. 1a, 56a.[2] In 1991, Sanders sought to reopen his claim, first denied in 1949, for a right-eye disability sustained while he served in the United States Army from 1942 to 1945. *Id.* at 1a-2a, 25a. As relevant here, the Board ultimately denied the claim, holding, *inter alia*, that there was no VCAA notice error. *Id.* at 30a, 43a. On appeal, the Veterans Court affirmed. The court stated that it "need not consider whether any error occurred." *Id.* at 38a. Rather, it concluded, under *Mayfield*, that because the alleged notice errors were not first-element notice errors, Sanders had the burden of showing prejudice from those errors and had failed to do so. *See id.* at 38a-39a.

Sanders appealed to the Federal Circuit, which reversed and remanded. Pet. App. 21a. The Federal Circuit rejected *Mayfield*'s approach of varying the placement of the burden depending on whether a first-element notice error is at issue. It held that "in light of the uniquely pro-claimant benefit system created by the VCAA," *id.* at 20a, *all* VCAA notice errors should be presumed prejudicial, placing the burden on the agency rather than the claimant. *Id.* at 14a. "Put simply, interpreting § 7261(b)(2) [the rule of prejudicial error] as requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

3. In *Simmons*, the Federal Circuit affirmed the Veterans Court's remand. Citing *Sanders*, the court held that "the Veterans Court properly placed the bur-

---

[2] The Government has petitioned for certiorari in the instant case and in *Sanders* in the same petition.

den on the Secretary to establish that an error in a notice the [VA] was required to give Ms. Simmons was not prejudicial." Pet. App. 56a.

REASONS FOR DENYING THE PETITION

The Government's principal argument is that the Federal Circuit's application of Section 7261(b)(2), the prejudicial error rule at issue here, is in conflict with circuit court interpretations of the prejudicial error rule of the Administrative Procedure Act (APA). The Government is mistaken. Even assuming that the two provisions should be interpreted to have the same meaning, which is far from clear, the APA provision is flexible; it has at times been interpreted to place the burden of proving harmlessness on the agency defending its error. *See* Part I *infra*. Moreover, in light of the unique statutory framework—which, among other things, mandates that the agency assist the veteran—the Federal Circuit properly placed the burden on the agency when it fails to comply with the VCAA. *See* Part II *infra*.

The Government's concerns about the consequences of the Federal Circuit's approach are overstated and misplaced. Although the Government notes that veterans file 800,000 claims for veterans benefits each year, the rule of prejudicial error is only relevant on appeal. And, in fact, there are fewer than 5,000 appeals filed in the Veterans Court each year; VCAA notice violations and the rule of prejudicial error will be at issue in only a subset of these appeals. *See* Part III *infra*. Finally, even if the Court were inclined to address this question, it should do so in a different case. *See* Part IV *infra*.

I. THE APA RULE OF PREJUDICIAL ERROR IS FLEXIBLE AND CONTEXT-SPECIFIC

The Government's argument that there is a circuit split rests on its contention that the "courts of appeals are unanimous in interpreting the APA to impose upon a party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial." Pet. 7. Yet even assuming *arguendo* that the APA prejudicial error rule is relevant in interpreting the different prejudicial error statute at issue here, the Government's argument fails; the courts of appeals take a flexible view of the allocation of the burden under the APA's prejudicial error rule.[3] And contrary to the Government's assertion, the burden is not always placed on the party challenging agency action.

The adaptability of the rule is supported by the language of the statute—that a court should take "due account" of the rule of prejudicial error. 5 U.S.C. § 706(2).[4] As one indication of this flexibility, courts have been "cautious" when applying the APA rule of prejudicial error—and have proceeded "gingerly"—when the circumstances so require. *See Doe* v. *Hamp-*

---

[3] In many instances, moreover, courts do not address the burden of proof at all. *See, e.g., Nevada* v. *Department of Energy*, 457 F.3d 78, 89-91 (D.C. Cir. 2006) (evaluating prejudicial error under the APA without considering burden); *PDK Labs. Inc.* v. *DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (same).

[4] *See* Berger, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137, 160 (1967) ("The need for flexibility ... was met by leaving the courts free to take '*due* account ... of the rule of prejudicial error.' 'Due' means 'just and proper,' i.e., reasonable in all the circumstances, as in 'due care.'" (emphasis in original)).

ton, 566 F.2d 265, 277-278 n.29 (D.C. Cir. 1977) ("we ... have been cautious in applying the doctrine of harmless administrative error when basic procedural rights have been implicated"); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 n.16 (D.C. Cir. 1970) (rule of prejudicial error "must be used gingerly, if at all, when basic procedural rights are at stake"); *see also Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1071 (9th Cir. 2004) ("In the context of agency review, the role of harmless error is constrained."); *Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (Kozinski, J.) ("[W]e must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context.").

On the question raised by the Government—which party has the burden to prove or disprove prejudicial error under the APA—the courts of appeals adapt to the circumstances. For example, although the D.C. Circuit often places the burden on the party challenging agency action (*see* Pet. 10), that court has also held that the "imposition of such a burden on the challenger is normally inappropriate where the agency has completely failed" to comply with the statutory procedural requirements set out in Section 553 of the APA. *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988). For this type of error, "a showing of actual prejudice is not required under the preju-

dicial error rule." *Sprint Corp.* v. *FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003).[5]

The Ninth Circuit shifts the burden under the APA "depending on both the types of action and error at issue." *City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004). Thus, in certain contexts, the Ninth Circuit has held that "precedent dictates that the *agency* must demonstrate that its error ... was harmless." *Gifford Pinchot Task Force*, 378 F.3d at 1071 (emphasis added); *see also Natural Resources Defense Council* v. *U.S. Forest Service*, 421 F.3d 797, 807 (9th Cir. 2005) ("The Forest Service bears the burden of demonstrating harmlessness.").

And the Tenth Circuit has shifted the burden of proof when addressing the APA prejudicial error rule where the context so warranted, namely, in a suit brought by Native Americans. *See Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1335-1336 (10th Cir. 1982). The Tenth Circuit held that burden shifting was appropriate in light of, *inter alia*, the nature of the error and "the underlying policy of protection of the in-

---

[5] The Fifth Circuit has also relieved the party challenging agency error from proving prejudice in cases involving violations of notice-and-comment rulemaking; the court refuses to "assume that there was no prejudice" because, under that court's precedent, "[a]bsence of such prejudice must be clear for harmless error to be applicable." *U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 215 (5th Cir. 1979); *see also Sierra Club* v. *U.S. Fish & Wildlife Service*, 245 F.3d 434, 444 (5th Cir. 2001) (refusing to deem agency error harmless when court could "not find that prejudice was clearly absent").

terests of the Indians for whose benefit the regulation was adopted." *Id.* at 1336.[6]

The lack of a conflict warranting this Court's intervention is further demonstrated by the Federal Circuit's own treatment of the APA rule of prejudicial error. As the Government acknowledges (Pet. 10), the Federal Circuit at times places the burden of proof on the party claiming error. *See Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 396 (Fed. Cir. 1996). In other words, the Federal Circuit's shifting of the burden in this case was not due to any misunderstanding of the APA prejudicial error rule; rather, it was based on the unique statutory context at issue here.

II. GIVEN THE IMPORTANCE OF THE VCAA NOTICE REQUIREMENTS TO THE PRO-CLAIMANT VETERANS BENEFITS SYSTEM, THE FEDERAL CIRCUIT PROPERLY ALLOCATED THE PREJUDICIAL ERROR BURDEN OF PROOF TO THE AGENCY

Congress has created a uniquely pro-claimant framework to aid veterans seeking benefits. The statutory scheme mandates that the agency assist the veteran; in particular, the VCAA notice provisions set forth specific assistance that the agency is required to provide. In light of this context, the Federal Circuit correctly interpreted Section 7261(b)(2) to place the burden on the agency when it fails to comply with the VCAA notice requirements.

---

[6] The Second Circuit also appears to have a flexible approach, as at least one Second Circuit case could be read to suggest that the burden can appropriately be placed on the agency. *See New York Pub. Interest Research Group* v. *Whitman*, 321 F.3d 316, 334 n.13 (2d Cir. 2003).

1. The system for adjudicating veterans benefits claims is unique in the administrative context for its manifestly pro-claimant stance. *See, e.g., Nolen* v. *Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (noting "that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" (internal quotation marks omitted)); H.R. Rep. No. 105-52, at 2 (1997) (claim system "is unlike any other adjudicative process," in that it is "specifically designed to be claimant friendly").[7] Under this system, Congress expects the agency "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988); *see also Jaquay* v. *Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002) ("Congress has created a paternalistic veterans' benefits system to care for those who served their country in uniform.").

Congress safeguarded the pro-claimant orientation of the VA system when, in 1988, it added judicial review provisions and created the Veterans Court. *See Hodge* v. *West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("[E]ven in creating judicial review in the veterans context, Congress intended to preserve the historic, pro-claimant system."). Congress expected the Veterans Court to ensure "that veterans ... receive every possible consideration when the [court] reviews a case." H.R. Rep. No. 100-963, at 26. The same legislation also codified a number of pro-claimant provisions, including the requirement that the VA "give the benefit of the

---

[7] *See also Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) (describing the veterans claims process as "designed to function throughout with a high degree of informality and solicitude for the claimant").

doubt" to the veteran whenever "there is an approximate balance of positive and negative evidence." 38 U.S.C. § 5107(b); *see also* Pub. L. No. 100-687, 102 Stat. 4105, 4106-4107 (1988).

Congress's enactment of the VCAA in 2000 reinforced and expanded this pro-claimant framework, putting in place "enormously far-reaching adjudication safeguards." *Holliday* v. *Principi*, 14 Vet. App. 280, 290 (2001), *overruled on other grounds by Kuzma* v. *Principi*, 341 F.3d 1327 (Fed. Cir. 2003). The VCAA's notice provisions are a critical part of the assistance provided to claimants. As the Federal Circuit has recognized, these provisions "ensure that the claimant's case is presented to the initial decisionmaker with whatever support is available, and ... ensure that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant." *Mayfield* v. *Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006). In so doing, the provisions protect the right of claimants to have "a meaningful opportunity to participate in the adjudication of [their] claims." *Kent* v. *Nicholson*, 20 Vet. App. 1, 9 (2006); *see also Mayfield*, 19 Vet. App. at 120 (notice requirement plays "a fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system").

2. Notwithstanding the unique, pro-claimant system created by Congress, the Government contends that the prejudicial error rule in Section 7261(b)(2) must be interpreted to require that the claimant prove prejudice. This construction is unwarranted by the language of the provision, which, like the APA prejudicial error rule, does not allocate a burden of proof and states that "due account" should be taken of the rule of prejudicial error. It is also inconsistent with the pro-

claimant statutory scheme, as it would undermine various protections under the statute (such as the agency's duty to assist) and would permit the agency effectively to ignore the VCAA requirements. The Government's construction is especially inappropriate where, as here, the agency has failed to provide the most basic of the notifications—notice of what evidence is necessary to substantiate her claim (*i.e.*, a first-element notice error). *See* 38 U.S.C. § 5103(a); *see also Mayfield*, 19 Vet. App. at 122.

In light of the unique statutory framework and Congress's special concern for veterans, the Federal Circuit was correct to place the burden on the agency when the agency fails to comply with the VCAA requirements. As in *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982), in which the Tenth Circuit shifted the burden under the APA prejudicial error rule in light of, *inter alia*, "the underlying policy of protection of the interests of the Indians," *id.* at 1336, burden shifting is also appropriate here. *See also Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973) ("There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experience in the different situations." (internal quotation marks omitted)). If placing the burden on the agency leads to a remand, it "will of course give petitioner one more procedural bite at the apple, but it is the first bite of the quality to which [she] was entitled from the start." *McLouth*, 838 F.2d at 1324.

To the extent there is any ambiguity about whether Section 7261(b)(2) should be read to place the burden on the agency when it fails to satisfy the VCAA notice requirements, that ambiguity is properly re-

solved in the veteran's favor. "[I]t is a well-established rule of statutory construction that when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'" *National Org. of Veterans' Advocates* v. *Secretary of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)); *see also, e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991) (referring to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").

The Government's interpretation is incorrect regardless of whether Section 7261(b)(2) should be interpreted consistently with the APA prejudicial error rule. The relevance of the APA's prejudicial error rule, however, is far from clear, as this case involves a different provision in a different statute. Although the two provisions are similarly phrased, the Government fails to give proper weight to a "cardinal rule" of statutory interpretation: "that [s]tatutory language must be read in context." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596-597 (2004) (internal quotation mark omitted) (declining to hold that the word "age" had the same meaning throughout a statute); *see also, e.g.*, *District of Columbia* v. *Carter*, 409 U.S. 418, 420-421 (1973). In the unique context at issue, the Federal Circuit was correct to interpret Section 7261(b)(2) to place the burden on the agency.[8]

---

[8] The Government also relies on the principle that "specific statutory language prevails over a more general provision." Pet. 15. The Government's petition assumes, without explanation, that the prejudicial error rule is the more specific provision. *See id.* (noting on the basis of the "specific governs the general" rule that "the VCAA cannot be read to have altered the prejudicial error

3. Contrary to the Government's argument, the court of appeals was correct to analogize the question presented to cases in the criminal and habeas contexts, *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995).

In *Kotteakos*, the Court considered the question of who should bear the burden of proving harmlessness under the federal harmless error statute. The Court made clear that this burden varied depending on the error at issue. *See Kotteakos*, 328 U.S. at 760. For mere "technical errors," the party asserting error bears the burden of proving harm; but if the "error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will ... rest upon the one who claims under it." *Id.* (quoting H.R. Rep. No. 65-913, at 1 (1919));[9] *see also O'Neal*, 513 U.S. at 445 ("[W]hen a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief.").

These cases shed light on the burden shifting question at issue here. The D.C. Circuit, for example, has noted that the APA prejudicial error rule functions "in much the same way the harmless error rule affects ap-

---

rule"). Yet, the prejudicial error rule is a general rule of review, while the VCAA establishes specific notice rights for veterans. *See Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (explaining that "[a] general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

[9] In making this distinction, the Court recognized the inherent difficulty in labeling an error "technical" or "substantive," emphasized the importance of context in making that distinction, and said only experience and judgment could properly inform this inquiry. *See id.* at 761-762.

pellate review of other types of cases." *Doolin Sec. Sav. Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998); *cf. Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (the rule of prejudicial error in the APA "sums up in succinct fashion the 'harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies").

And contrary to the Government's argument, the cases are not "inapplicable ... because they involved an individual's loss of liberty." Pet. 19. While it is true that the Court discussed the special interests when liberty is at stake, *see Kotteakos*, 328 U.S. at 759; *O'Neal*, 513 U.S. at 440, the Court also made clear that its reasoning could not be so limited. In *O'Neal*, the Court expressly rejected a distinction between criminal and civil cases: "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *Id.* at 441; *see id.* (noting that harmless error statute "applies in both civil and criminal proceedings"). And, with respect to non-habeas civil proceedings (*i.e.*, civil cases in which liberty is not at issue), the Court made clear that the same standard applies: "if ... we were to assume that the civil standard for judging harmlessness applies to habeas proceedings ... it would make no difference with respect to the matter before us." *Id.* at 442.[10]

---

[10] *See also O'Neal*, 513 U.S. at 450 (Thomas, J., dissenting) ("The Court concludes that ... the federal harmless-error statute, 28 U.S.C. § 2111, makes no distinction between civil and criminal cases; since the rule in the criminal context places the burden of persuasion on the government, the Court decides that the same should be true in the civil context.").

III. The Consequences Of The Federal Circuit's Approach Are Not Problematic

According to the Government, this Court's review is warranted because the decision below will result in a large number of agency remands that will "divert resources from the adjudication of meritorious claims." *See* Pet. 23-25. This argument is unfounded and, in any event, Congress has clearly expressed its willingness, in the context of veterans claims administration, to burden the VA when necessary to provide assistance to claimants.

In support of its claim that the decisions below will have a "significant adverse effect on the VA adjudication process," the Government states that the VA receives more than 800,000 benefits claims per year. Pet. 23. This figure, however, vastly overstates any possible effects from the decision below. In 2007, the Veterans Court received 4,644 appeals, and it remanded (in full or in part) only 2,045 cases.[11] And, of course, VCAA notice violations and the rule of prejudicial error will be at issue in only a subset of these appeals. Moreover, the Government can avoid any additional burden on the system simply by complying with the notice requirements that Congress has enacted.

The Government's arguments based on the effects of the decision below also rest on the view that the allocation of the burden to the agency will be outcome determinative. Pet. 24. Yet there are numerous ways for

---

[11] *See* United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited May 15, 2008).

the agency to demonstrate a lack of prejudice;[12] and in many cases a lack of prejudice will be obvious from the record.[13]

Even if placing the burden on the agency is outcome determinative, the Government's suggestion that this warrants placing the burden on the veteran ignores the context of the claims at issue. Allocating the burden to the veteran is at least as likely to be outcome determinative,[14] especially in light of the fact that a

---

[12] As the Federal Circuit explained, the agency can show, for example: (1) that lack of notice was cured by the claimant's actual knowledge; (2) "that a reasonable person could be expected to understand from the notice what was needed[;] or (3) that a benefit could not have been awarded as a matter of law." Pet. App. 14a-15a.

[13] *See, e.g.*, *Holmes* v. *Peake*, No. 06-0852, 2008 WL 974728, at *2 (Vet. App. Apr. 3, 2008) (claimant "demonstrated his actual knowledge of what was required to substantiate a higher disability rating when he specifically argued that he was entitled to a 30% disability rating and attached a copy of the pertinent rating schedule"); *Clark* v. *Peake*, No. 05-2422, 2008 WL 852588, at *4 (Vet. App. Mar. 24, 2008) ("appellant, throughout the pendency of his claim, has made submissions showing that he had actual knowledge of the need to submit evidence showing the effect that the worsening or increase of his foot condition had on his employment and daily life"); *Strock* v. *Peake*, No. 05-3560, 2008 WL 566394, at *3 (Vet. App. Feb. 7, 2008) ("the appellant's letter reveals his actual knowledge of the need for evidence to show that his disabilities were incurred during his military service and to show that his injuries existed from the time of his military service to the present").

[14] The claimant might be required to show, for example, "what evidence the appellant would have provided or requested the Secretary to obtain" had proper notice been provided, and "how the lack of that notice and evidence affected the essential fairness of the adjudication." *See Mayfield*, 19 Vet. App. at 121.

substantial percentage of claimants proceed pro se.[15] Thus, the Government's burden allocation view is premised on the notion that it is better that the veteran lose out on benefits (even where there was prejudice and benefits are clearly warranted) than the agency have to cope with additional remands. But the historical treatment of veterans claims and the express language of the VCAA make clear that Congress would prefer to place the risk—and the burden—on the Government. *See* H.R. Rep. No. 106-781, at 9 (2000) (The "goal is and has been to assist veterans in developing claims and receiving benefits for which they are eligible.").

Finally, Congress has in the past rejected efforts to preserve agency resources by burdening claimants; Congress acted to overrule a Veterans Court decision based on that rationale. In *Morton* v. *West*, 12 Vet. App. 477 (1999), the Veterans Court decided that the statutory scheme required veterans to make an initial showing that their claims were "well grounded" because "implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which—as well grounded—require adjudication." *Id.* at 480. Congress immediately passed the VCAA and overturned *Morton*, *see* H.R. Rep. No. 106-781, at 11—apparently finding it acceptable to burden the VA so that all veterans receive full assistance in developing their claims.

---

[15] In 2007, 53% of the claimants were unrepresented at the time of filing and 19% were unrepresented at the close of proceedings. United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited May 15, 2008).

IV. Even If The Question Presented Warrants Review, The Court Should Not Grant Review In These Cases

Both cases arise on interlocutory review[16] in circumstances that do not warrant this Court's review.

In *Simmons*, the resolution of the notice issue is potentially of limited consequence. As noted, the Veterans Court had two grounds for remanding Simmons's claim: the agency first had to address the deficiencies in first-element notice at issue here, and second, had to provide a medical examination unless there was clear evidence that Simmons received notice regarding the medical examinations that she had missed. Pet. App. 76a, 81a. Accordingly, although a decision by this Court on the first issue would determine whether the notice deficiency issue remains on remand, the case will still need to be remanded to address the medical examination issue, which could ultimately lead to a result in Simmons's favor.

The Government's petition in *Sanders* should be denied because the question presented is hypothetical in that case, as there has been no finding of error. Indeed, the Board expressly found that there was no VCAA error (*see* Pet. App. 43a), and this finding is reviewable by the Veterans Court only for "clear error." *See Garrison* v. *Nicholson*, 494 F.3d 1366, 1370 (Fed.

---

[16] The lack of finality alone is reason enough to deny the petition. *See Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of a writ of certiorari) (concurring in denial because the court of appeals had "vacated the judgment ... and remanded the case to the District Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also* Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 (9th ed. 2007).

Cir. 2007). Neither the Veterans Court nor the Federal Circuit addressed the question whether an error had occurred in Sanders's case. *See* Pet. App. 38a (Veterans Court) (stating that it "need not consider whether any error occurred"); *id.* at 14a-21a (Federal Circuit).[17] This Court should await review where the predicate to the burden allocation question—the existence of a notice error—is established. And if the Government is correct that the issue in these cases will have far-reaching effects, then the Court will have ready opportunities to do so.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted.

DOUGLAS J. ROSINSKI
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1320 Main Street
Columbia, SC 29201
(803) 252-1300

SEAN A. RAVIN
2800 Quebec Street, NW
Washington, DC 20008
(202) 607-5731

CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
MEGAN BARBERO
MATTHEW T. JONES
CATHERINE A. MARLANTES
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

MAY 2008

---

[17] In fact, the Federal Circuit lacks jurisdiction over this question. *See* 38 U.S.C. § 7292(d)(2).

REPLY BRIEF

No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

PATRICIA D. SIMMONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. The decisions below cannot be reconciled with the decisions of other courts of appeals interpreting materially identical language in the APA 2
B. There is no basis for creating a unique rule of prejudicial error applicable only to VA adjudications 4
C. The question presented warrants this Court's review 7
D. These cases are appropriate vehicles for resolving the question presented 8

TABLE OF AUTHORITIES

Cases:

Brown v. *Gardner*, 513 U.S. 115 (1994) 5
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 2
Cigna Ins. Co. v. *Oy Saunatec, Ltd.*, 241 F.3d 1 (1st Cir. 2001) 6
Dresser-Rand Co. v. *Virtual Automation Inc.*, 361 F.3d 831 (5th Cir. 2004) 6
Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982) 3
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) 5
Kotteakos v. *United States*, 328 U.S. 750 (1946) 6
MacPhee v. *Nicholson*, 459 F.3d 1323 (Fed. Cir. 2006) ... 9
Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71 (2006) 4
Morton v. *West*, 12 Vet. App. 477 (1999) 8

Cases—Continued: Page

NLRB v. *Seine & Line Fishermen's Union*, 374 F.2d 974 (9th Cir.), cert. denied, 389 U.S. 913 (1967) 5
Obrey v. *Johnson*, 400 F.3d 691 (9th Cir. 2005) 6
O'Neal v. *McAninch*, 513 U.S. 432 (1995) 6
Palmer v. *Hoffman*, 318 U.S. 109 (1943) 5
Piamba Cortes v. *American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999), cert. denied, 528 U.S. 1136 (2000) 6
Qualley v. *Clo-Tex Int'l, Inc.*, 212 F.3d 1123 (8th Cir. 2000) 6
Rogers v. *City of Chicago*, 320 F.3d 748 (7th Cir. 2003) ... 6
Sanders v. *Mansfield*, No. 03-1846, 2007 WL 4386066 (Vet. App. Nov. 28, 2007) 10
Sierra Club v. *United States Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001) 3
Sprint Corp. v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003) 3
Tesser v. *Board of Educ. of the City Sch. Dist.*, 370 F.3d 314 (2d Cir. 2004) 6
Vazquez-Flores v. *Peake*, 22 Vet. App. 37 (2008) 7

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 1
5 U.S.C. 706 ..... 1, 2, 3, 4
Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 2
§ 3(a), 114 Stat. 2096 8
28 U.S.C. 2111 6

Statutes, regulations and rule—Continued: Page

38 U.S.C. 1110 9
38 U.S.C. 1131 9
38 U.S.C. 5103(a) 7
38 U.S.C. 7261(b)(2) (Supp. V 2005) 2, 3, 4, 5
Fed. R. Civ. P. 61 6
38 C.F.R.:
Section 3.303 9
Section 3.310(a) 9

Miscellaneous:

H. R. Rep. No. 781, 106th Cong., 2d Sess. (2000) 8
S. Rep. No. 418, 100th Cong., 2d Sess. (1988) 4

In the Supreme Court of the United States

No. 07-1209

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

PATRICIA D. SIMMONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

Under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "due account shall be taken of the rule of prejudicial error" when courts review agency action. 5 U.S.C. 706. The uniform view of the courts of appeals has been that Section 706 imposes on the party challenging an agency's action the burden of showing not only that the agency erred but also that the error was prejudicial. That view was well settled by 1988, when Congress adopted the language of Section 706 in directing that the United States

Court of Appeals for Veterans Claims (Veterans Court) "take due account of the rule of prejudicial error" in reviewing administrative benefits determinations. 38 U.S.C. 7261(b)(2) (Supp. V 2005). The Federal Circuit erred in disregarding the settled construction of that statutory language and instead adopting a presumption of prejudice whenever the Veterans Administration (VA) fails to give a benefits claimant the notice required by the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. Its decisions will consume adjudicatory resources with a large number of unnecessary remands in cases involving technical notice errors, delaying the resolution of meritorious claims. This Court's review is warranted.

A. The Decisions Below Cannot Be Reconciled With The Decisions Of Other Courts Of Appeals Interpreting Materially Identical Language In The APA

Respondents make little effort to dispute that the weight of authority supports the view that Section 706 imposes a burden of showing prejudice on the party challenging agency action. Respondents note (Simmons Br. in Opp. 8 n.3) that some cases "do not address the burden of proof at all." That is hardly surprising, since in some cases, the allocation of the burden is irrelevant to the outcome, so there is no need to discuss it. Nor is it significant that some courts have called for "caution," *id.* at 9, in the application of the rule of prejudicial error. Courts should indeed be "cautious," *id.* at 8, in evaluating whether an error is prejudicial, just as they should conduct a "careful" review in answering the antecedent question whether the agency erred, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). But the appropriateness of judicial circum-

spection says little, if anything, about how to allocate the burden of showing prejudice.

Respondents emphasize (Simmons Br. in Opp. 8) that the APA, like Section 7261(b)(2), calls for courts to take "due" account of the rule of prejudicial error. From this they infer that reviewing courts should have "flexibility" in the rule's application. But whatever the proper scope of flexibility in *applying* the rule, the statute does not give reviewing courts unlimited discretion to decide what the rule is. On the contrary, the use of the definite article in the phrase "the rule of prejudicial error" demonstrates that Congress intended for courts to apply a specific, pre-existing rule. As explained in the petition, that rule is one that places the burden of showing prejudice on the party challenging the agency's action.

Respondents cite cases that, they say, interpret the APA to impose on the government the burden of showing a lack of prejudice in certain circumstances. Simmons Br. in Opp. 9-10. But one of the cases they cite did not interpret the APA at all; it held that Section 706 was inapplicable. See *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1336 (10th Cir. 1982) ("We are not persuaded that the violation * * * fits within the § 706 pattern of prejudicial error."). And several of the other cases did set aside agency action under Section 706, but they did so only after identifying evidence of prejudice. See, *e.g.*, *Sprint Corp.* v. *FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) ("Sprint has made a colorable claim that it would have more thoroughly presented its arguments had it known that the Commission was contemplating a rulemaking."); *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (noting that reliance on an invalid regulation "permeates" the agency's decision and "directly informed [its] conclusion").

In any event, the cases identified by respondent are, at most, evidence of conflicts within some circuits, since the circuits on whose decisions they rely have also squarely held that Section 706 requires the party challenging the agency's action to bear the burden of showing prejudice. See Pet. 10. And even if some circuits had unequivocally endorsed the Federal Circuit's view—which they have not—there would still be a deep conflict between the Federal Circuit's interpretation of Section 7261(b)(2) and nearly every other circuit's interpretation of the materially identical language of the APA.

B. There Is No Basis For Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

1. Like the court of appeals, respondents contend that "unique" features of the veterans-benefit adjudication process justify departing from the uniform construction of the rule of prejudicial error under the APA. As explained in the petition (at 16-17), that argument rests on a confusion between the administrative claims-adjudication process, which is designed to be informal and non-adversarial, and the process of judicial review, which is not. More to the point, Congress's general desire to create a "pro-claimant" adjudication system (Simmons Br. in Opp. 12; Sanders Br. in Opp. 4) cannot displace the specific statutory language of Section 7261(b)(2). Because it chose to repeat language that already had a settled judicial interpretation, Congress should be presumed to have intended to incorporate that interpretation. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006). That presumption is reinforced here by the Senate Committee Report accompanying Section 7261(b)(2). See S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988). That report—which respondents do not address—did not simply refer to the APA in explain-

ing the source of Section 7261(b)(2); it actually cited a Ninth Circuit decision that had held that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981, cert. denied, 389 U.S. 913 (1967) (quoting *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943)). It is the language of Section 7261(b)(2), not general principles of a "pro-claimant" system, that is controlling here.

Respondents seek to avoid the application of the principle that the more specific provision is controlling, contending that "the prejudicial error rule is a general right of review, while the VCAA establishes specific notice rights for veterans." Simmons Br. in Opp. 15 n.8. That argument overlooks that Section 7261(b)(2) is a prejudicial-error rule specifically directed at the review of veterans-benefit adjudications. In determining how to allocate the burden of showing prejudice, Section 7261(b)(2) is the statute that offers the most relevant guidance.

2. Respondents rely (Simmons Br. in Opp. 15) on the canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Section 7261(b)(2), however, is not a substantive "provision[] for benefits"; it is a procedural statute governing the scope of judicial review. More importantly, the canon is applicable only when a statute is ambiguous. Cf. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). "Ambiguity is a creature not of definitional possibilities but of statutory context," *ibid.*, and in light of the well-settled meaning of the language in the APA that Congress borrowed for Section 7261(b)(2), that provision is not ambiguous.

3. Respondents repeat the error of the court of appeals, Pet. App. 15a, in relying on the treatment of harmless error

in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Those cases interpreted a different statute that uses different language, and they involved the review of errors "in a *criminal* proceeding" in which "someone's custody, rather than mere civil liability, is at stake." *Id.* at 440. Respondents argue (Simmons Br. in Opp. 17; Sanders Br. in Opp. 1-4) that *O'Neal*'s analysis is applicable to civil cases outside of the habeas context, but even after *O'Neal*, most courts of appeals have held that the party asserting error in a civil case has the burden of showing prejudice under the harmless-error rules of 28 U.S.C. 2111 or Federal Rule of Civil Procedure 61. See Pet. 20-21; see also *Tesser* v. *Board of Educ. of the City Sch. Dist.*, 370 F.3d 314, 319-320 (2d Cir. 2004); *Dresser-Rand Co.* v. *Virtual Automation Inc.*, 361 F.3d 831, 841-842 (5th Cir. 2004); *Rogers* v. *City of Chicago*, 320 F.3d 748, 751 (7th Cir. 2003); *Cigna Ins. Co.* v. *Oy Saunatec, Ltd.*, 241 F.3d 1, 8 (1st Cir. 2001); *Qualley* v. *Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1127-1128 (8th Cir. 2000); *Piamba Cortes* v. *American Airlines, Inc.*, 177 F.3d 1272, 1305-1306 (11th Cir. 1999), cert. denied, 528 U.S. 1136 (2000); but see *Obrey* v. *Johnson*, 400 F.3d 691, 699-702 (9th Cir. 2005).

In any event, whatever the relevance of *Kotteakos* and *O'Neal* to appellate review of a lower-court decision in a civil case, those decisions are not relevant to judicial review of agency action. Like the court of appeals, respondents ignore the significant differences between the relationship of agencies to reviewing courts and that of trial courts to appellate courts. See Pet. 21. They also overlook the features of the VA adjudication system that provide multiple opportunities to correct any initial deficiency in notice, thus reducing the likelihood of prejudice from a notice error, and making a presumption of prejudice especially inappropriate. See Pet. 22-23.

C. The Question Presented Warrants This Court's Review

The Federal Circuit's rule of presumptive prejudice in cases of VCAA notice error warrants this Court's review because it will burden the VA claims-processing system by generating a large number of unnecessary remands in cases where there was no prejudice from the notice error. Those remands will not lead to different results, but they will divert the agency's limited resources and delay the adjudication of meritorious claims.

Respondents attempt to minimize the burden on the VA by citing (Simmons Br. in Opp. 18) statistics showing that the Veterans Court hears over 4600 cases each year and remands over 2000 of them. Those numbers do nothing to refute the point that the additional remands produced by the decisions below will impose a significant burden. In any event, the number of cases that are appealed to the Veterans Court is not fixed; rather, it can be expected to increase in response to the decisions below, which make it easier for claimants to win appeals because of technical errors in a VCAA notice.

Indeed, the frequency of appeals challenging the sufficiency of the notice will only increase as the Veterans Court continues to issue decisions further defining the requirements of adequate notice. For example, in *Vazquez-Flores* v. *Peake*, 22 Vet. App. 37, 43-44 (2008), the Veterans Court determined that when the VA receives a claim for an increased disability rating, it is required, in certain circumstances, to provide information tailored to the claimant's "diagnostic code" in the initial notice letter in order for the notice to be considered sufficient under Section 5103(a). Under the rule adopted by the court of appeals, many increased-rating claims pending before, or to be appealed to, the Veterans Court will require a remand, a new notice, and readjudication unless the Secretary can somehow demon-

strate a lack of prejudice resulting from the insufficient notice.

Respondents point out (Simmons Br. in Opp. 18-19) that it is not impossible for the agency to demonstrate a lack of prejudice. That is true, and there may well be cases, like those respondents cite, in which the lack of any prejudice is apparent on the record. But there will undoubtedly be other cases in which there is no prejudice but the VA is nevertheless unable to demonstrate a lack of prejudice because of the difficulty of proving a negative. As noted in the petition (at 21-22), the claimant is uniquely well suited to identify prejudice when it exists.

Finally, noting Congress's enactment of the VCAA to overturn *Morton* v. *West*, 12 Vet. App. 477 (1999), respondents argue (Simmons Br. in Opp. 20) that Congress "has in the past rejected efforts to preserve agency resources by burdening claimants." But in enacting the VCAA, Congress merely codified the notice that the VA was already providing to claimants at the time of enactment. See VCAA § 3(a), 114 Stat. 2096; H.R. Rep. No. 781, 106th Cong., 2d Sess. 9 (2000). The enactment of the VCAA hardly demonstrates that Congress is indifferent to the preservation of the VA's adjudicatory resources, still less that it intended (without saying so) to reverse the longstanding allocation of the burden of showing prejudice.

D. These Cases Are Appropriate Vehicles For Resolving The Question Presented

Respondents observe (Simmons Br. in Opp. 21) that these cases are currently in an interlocutory posture because the court of appeals ordered a remand to the Veterans Court. That is not a reason to deny review, because the very question in these cases is whether the cases are *appropriately* in an interlocutory posture, *i.e.*, whether the re-

mand decisions were proper. Under the rule adopted by the court of appeals, the issue in these cases can arise *only* in an interlocutory posture. When a remand is ordered because of a VCAA notice error, the claimant will be given the proper notice and the case will be readjudicated, thus mooting the question whether the remand was appropriate. When a remand is not necessary even though the government bears the burden of proof under the court of appeals' rule, then the issue will not be presented at all. Thus, if the issue in these cases cannot be reviewed when it arises in the context of a remand order, it cannot be reviewed at all.

Respondents' arguments about their individual cases also do not provide a basis for denying review. Simmons asserts (Br. in Opp. 21) that a remand of her "case" is required irrespective of whether or how the Court decides the question raised in this petition, because, in addition to remanding due to a VCAA notice error, the court of appeals also ordered a remand to allow the agency to conduct a medical examination. That is incorrect. Simmons had two separate claims pending before the Board and the Veterans Court: a claim for an increased rating for her hearing loss in her left ear (the claim involved in this petition), and a separate claim for secondary service connection for hearing loss in her right ear (a claim that is not addressed by this petition). Those two claims are separate and distinct from each other. See 38 U.S.C. 1110, 1131; 38 C.F.R. 3.303, 3.310(a); *MacPhee* v. *Nicholson*, 459 F.3d 1323, 1327-1328 (Fed. Cir. 2006) (rejecting argument that claim for secondary service connection is the same as a claim for an increased rating for the primary service-connected condition). The medical examination ordered by the court of appeals relates only to the right-ear claim. Pet. App. 76a. Accordingly, a decision by this Court would finally resolve Simmons' left-ear claim, in addition to finally resolving the

issue for all other cases involving challenges to the initial notice provided by the Secretary. The pendency of Simmons's separate right-ear claim is therefore not a reason to deny review.

Simmons also contends (Br. 21-22) that review is inappropriate in Sanders's case because the question presented is merely "hypothetical," since "there has been no finding of error." It is true that the court of appeals did not determine whether there had been a VCAA notice error in Sanders's case. Pet. App. 14a-21a. But the court did order a remand for consideration of that issue, a remand that was entirely unnecessary and inappropriate under the government's view of the law. And in any event, the Veterans Court did find an error on remand: it held that the VA's notice was defective and untimely, and, applying the rule of presumptive prejudice, it remanded the case to the Board. See *Sanders* v. *Mansfield*, No. 03-1846, 2007 WL 4386066, *4-5 (Vet. App. Nov. 28, 2007). Thus, the "predicate to the burden allocation question—the existence of a notice error" (Simmons Br. in Opp. 22) has now been established in Sanders's case (as in Simmons's, Pet. App. 78a), so both cases squarely present the question identified in the petition.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MAY 2008

JOINT APPENDIX

101

(6)

SUPREME COURT, U.S.
FILED
AUG 21 2008
CLERK

No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE, M.D., SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS AND PATRICIA D. SIMMONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

GREGORY G. GARRE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioner

CHRISTOPHER J. MEADE
Wilmer Cutler Pickering Hale and Dorr LLP
399 Park Avenue
New York, N.Y. 10022
(212) 230-8817

MARK R. LIPPMAN
The Veterans Law Group
8070 La Jolla Shores Drive
Suite 437
La Jolla, CA 92037
(858) 456-5840

Counsel of Record
for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: MAR. 21, 2008
CERTIORARI GRANTED: JUNE 16, 2008

TABLE OF CONTENTS

Page

Court of appeals docket entries (Sanders) 1
Court of appeals docket entries (Simmons) 3
Letter to Woodrow F. Sanders from Larry Gervase, dated Mar. 28, 2001 5
Letter to Woodrow F. Sanders from Larry Gervase, dated Dec. 27, 2002 10
Letter to Woodrow F. Sanders from Richard C. Haddock, dated June 18, 2003 24
Letter to Patricia D. Simmons from L.H. Henderson, dated Feb. 11, 2003 30
Letter to Patricia D. Simmons from L.H. Henderson, dated Mar. 8, 2001 41

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7001

WOODROW F. SANDERS

v.

DEPARTMENT OF VETERANS AFFAIRS

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
10/27/2005	Received docketing statement from Appellant Woodrow F. Sanders. Service: by mail on 10/27/05
11/10/2005	Motion by Appellant-Unopposed motion to stay proceedings. Service: by mail on 11/3/2005
	* * * * *
11/28/2005	Action motion granted. Appellant should inform this court within 30 days of this Court's disposition of Mayfield v. DVA, 05-7157, how he believes this case should proceed. DVA may also respond within that time.

DATE	PROCEEDINGS
6/2/2006	Motion by Appellant-Unopposed motion to set a briefing schedule. Service by mail on 5/25/2006
6/15/2006	Appellant Principal Brief Filing Date
	* * * * *
8/10/2006	Appellee or Cross Appellant Principal Brief Filing Date
8/24/2006	Appellant Reply Brief Filing Date
	* * * * *
2/6/2007	Oral Argument Date/Calendared
	* * * * *
5/16/2007	Disposition: Reversed and Remanded; by Panel
	* * * * *

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 06-7092

PATRICIA D. SIMMONS

v.

DEPARTMENT OF VETERANS AFFAIRS

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
5/5/2006	Docketing Statement from Appellant, R. James Nicholson, Secretary of Veterans Affairs SERVICE: by Mail on 5/3/2006
7/21/2006	Appellant Principal Brief Filing Date
	* * * * *
8/28/2006	Appellee or Cross Appellant Principal Brief Filing Date
11/3/2006	Appellant Reply Brief Filing Date
	* * * * *
2/6/2007	Oral Argument Date/Calendared

DATE	PROCEEDINGS
5/16/07	Disposition: Affirmed and Remanded By Panel

* * * * *

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
11000 Wilshire Boulevard
Los Angeles, CA 90024

[Mar 28, 2001] In Reply Refer To: 344/21F

Woodrow F. Sanders 13 575 481
[REDACTED] W. F. SAUNDERS

Dear Mr. Sanders:

This is in further reference to the appeal you have filed from our decision on your claim for benefits.

Before placing your records on the docket of the Board of Veterans' Appeals, we are giving you the opportunity to make any comment you wish concerning the additional information in the enclosed Supplemental Statement of the Case. If you have already filed a Substantive Appeal (VA Form 9) with respect to the issue(s) contained in this Supplemental Statement of the Case, a response at this time is optional.

If this Supplemental Statement of the Case, however, contains an issue which was not included in your Substantive Appeal, you must respond within 60 days to perfect your appeal as to the new issue. If you do not timely file a Substantive Appeal as to any new issue(s) we will place your records on the docket of the Board of Veterans' Appeals for review of the prior issues, if any, and the Board of Veterans' Appeals will provide you with a copy of its decision.

If you have already filed a Substantive Appeal on all issues and you feel that you have stated your case completely, you should let us know so that we may forward your appeal to the Board without waiting for the 60-day period to expire.

Sincerely,

LARRY GERVASE
Veterans Service Center Manager

Enclosure(s):

cc: Pvt. Atty. Mark R. Lippman

Supplemental Statement of the Case	***Department of Veterans Affairs*** ***Los Angeles Regional Office***		**1/09/ 2001**
NAME OF VETERAN W.F. Saunders	VA FILE NUMBER 13 575 481	SOCIAL SECURITY NR **[RE-DACTED]**	POA Pvt. Atty. Mark R. Lippman

ISSUE:

Service connection for choriodoretinitis of the right eye.

EVIDENCE:

VA. examination dated 12-1-2000 from VA Outpatient Clinic Sepulveda, CA.

ADJUDICATIVE ACTIONS:

6-7-2000	The appeal was remanded by the Board of Veterans' Appeals for examination and opinion.
1-9-2001	Claim reconsidered based on additional evidence

DECISION:

Service connection for choriodoretinitis of the right eye is denied.

REASONS AND BASES:

Service connection may be granted for a disability which began in military service or was caused by some event or experience in service. Service connection for choriodoretinitis of the right eye is denied since this condition neither occurred in nor was caused by service.

Service connection for choriodoretinitis of the right eye had been previously denied by a rating decision of February 1949 and no appeal timely filed. The veteran reopened his claim in August 1991 and the Board of Veterans Appeals has determined that evidence received since the February 1949 rating decision is new and material and that the claim for service connection has been successfully reopened. The claims folder was remanded for examination and opinion based on the successfully reopened claim.

VA examination shows an assessment of decreased vision of the right eye from a macular scar with cause shown as unknown. The examiner states that the claims folder was reviewed and that it is unlikely that decreased vision of the right eye was related to service. The examiner shows no documentation of evidence of reduced vision until 1948 with the records showing the veteran reporting decreased vision only six months prior to that visit. While it is certainly possible for there to have been damage to the retina in 1944 that then hemorrhaged in 1948, as hemorrhages were noted in 1948, there were no other signs of ocular trauma. The examiner states the choriodoretinitis was most likely infectious in nature, although the etiology at this

point is impossible to determine. While it is also possible the veteran contracted some infection while in service that caused the chorioretinitis, there is also no way to prove this either. Based on the documented records, the veteran suffered no visual loss while in service.

PREPARED BY: /s/ WILLIAM A. CHRISTER
WILLIAM A. CHRISTER

APPROVED BY: /s/ WILLIAM F. WACENSKE II
WILLIAM F. WACENSKE II

DEPARTMENT OF VETERANS AFFAIRS
Los Angeles Regional Office
11000 Wilshire Blvd.
Los Angeles CA 90024

December 27, 2002

In Reply Refer To:
344/216/gl
C-13 575 481
SANDERS, W.F.

WOODROW SANDERS
[REDACTED]

Dear Mr. Sanders:

This is in further reference to the appeal you have filed from our decision on your claim for benefits. It is not a decision on the appeal you have initiated. It is a Supplemental Statement of the Case which contains changes or additions to the original Statement of the Case sent to you on October 27, 1994. A previous Supplemental Statement of the Case was sent on September 18, 1995 and March 28, 2001.

We are giving you a period of 60 days to make any comment you wish concerning the additional information. A response at this time is optional.

As you previously requested, we are scheduling you for a personal hearing before the Board of Veterans' Appeals. You will receive separate notification about the time and place of your hearing.

Sincerely yours,

/s/ LARRY GERVASE
LARRY GERVASE
Service Center Manager

CC: Mark R. Lippman
Attorney At Law
8070 La Jolla Shores Dr. #437
La Jolla CA 92037

Supplemental Statement of the Case	***Department of Veterans Affairs*** ***Los Angeles Regional Office***		12/27/02
NAME OF VETERAN W.F. Sanders	VA FILE NUMBER C-13 575 481	SOCIAL SECURITY NR **[RE-DACTED]**	POA Mark R. Lippman

ISSUE:

Service connection for choroidoretinitis of the right eye.

EVIDENCE:

- Outpatient treatment records from VA Outpatient Clinic, Bakersfield CA dated April 15, 1998 to July 25, 2001
- Report of VA examination dated August 27, 2001 from Duane Y. Nii, M.D.

ADJUDICATIVE ACTIONS:

06-07-2000	The appeal was remanded by the Board of Veterans' Appeals for VA examination.
03-28-2001	The veteran was furnished a Supplemental Statement of the Case outlining actions taken on the claim.
08-15-2001	VA examination conducted at Duane Y. Nii, M.D.
12-27-2002	Claim considered based on all the evidence of record.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol "§" denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

§3.159 (New) Department of Veterans Main assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims

for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence.

(1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim. If VA does not receive the necessary information and evidence requested from the claimant within one year of the date of the notice, VA cannot pay or provide any benefits based on that application. If the claimant has not responded to the request within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA

does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the request, VA must readjudicate the claim. (Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. (Authority 38 U.S.C. 5102(b), 5103A(3))

(c) VA's duty to assist claimants in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought,

then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records. (Authority: 38 U.S.C. 5103A(b)).

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal depart-

ment or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records. (Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which

treatment-was provided. (Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions.

(i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in § 3.309, § 3.313, § 3.316, and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured. (Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law. (Authority 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records.

(1) If VA makes reasonable efforts to obtain relevant non-Federal records is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final

attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA. (Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any. (Authority: 38 U.S.C. 5102(b), 5103(a))

DECISION:

Service connection for choroidoretinitis of the right eye is denied.

REASONS AND BASES:

The *Veterans Claims Assistance Act* of *2000,* Public L. No. 106-475, was signed into law on November 9, 2000. The law redefined the guidelines for the Department of Veterans Affairs with regard to its duty to assist veterans and claimants to establish their claims. In this case, it was determined that all the available medical information was of record to support your claim, and your claim was rated based on the evidence available. If there is other medical evidence you would like us to consider, please notify us and we will make a reasonable effort to obtain it.

We can grant service connection for a disability that you currently have if this disability began in military service or was caused by some event or experience in service.

Cited outpatient treatment reports include an ophthalmology evaluation on November 30, 2000. At that time, you reported a growth in the right eye, and reiterated your history of a bazooka gun injury in 1944. You were assessed with myopia and presbyopia. The examiner also noted that you were status post pterygium removal from the left eye.

During cited VA examination you complained of blurred vision in the left eye. You also reiterated your history of a right eye injury in 1944, and reported previous bilateral cataract extraction with lens implants. On examination, you were able to count fingers at one foot in the right eye and your vision was 20/40 in the left eye with

correction. The macula of the right eye showed a large central macular scar with a secondary punched out lesion in the superior macula. There was also evidence of posterior vitreal detachment in the right eye. The examiner provided the following diagnoses: dense macular scar of the right eye with small punched out scars; early macular degeneration of the left eye; bilateral pseudophakia; small angle exotropia of the right eye; and old corneal scar of the left eye status post pterygiumectomy.

The examiner, who did not review your medical records, noted that the etiology of the macular scar is difficult to ascertain. He indicated that if your vision had been normal in the right eye prior to the claimed injury, then it is possible that the macular scar could be related to the injury. However, due to the fact that you have additional punched out chorioretinal scars in both eyes, the possibility of toxoplasmosis as the etiology of the macular scar could also be entertained. The examiner stated that your decreased vision in the left eye could be related either to your macular degeneration and/or a secondary membrane present behind your corneal implants. He further stated that no treatment would benefit you in regards to rehabilitating the right eye.

As explained in our Supplemental Statement of the Case dated March 28, 2001, which is incorporated herein by reference, your service medical records show no documentation of reduced visual acuity. There is no documentation of reduced vision until 1948; at that time, you reported decreased vision of only six months' duration. Furthermore, the record is silent as to evidence of an in-service injury to the right eye.

In the absence of objective medical evidence showing a chronic disability related to your active military service,

service connection is not warranted for choroidoretinitis of the right eye.

PREPARED BY /s/ [ILLEGIBLE]
Decision Review Officer

DEPARTMENT OF VETERANS AFFAIRS
Los Angeles Regional Office
11000 Wilshire Boulevard
Los Angeles, CA 90024

[6-18-03] In Reply Refer To: 344/216/gl
C-13 575 481

WILLIAM SANDERS
[REDACTED]

Dear Mr. SANDERS:

We are working on your appeal which was remanded by the Board of Veterans Appeals on June 7, 2000, for:

- Service connection for a right eye condition

We have all of the information we need to process your claim. However, if there is additional medical evidence you want us to consider, you should follow the instructions in this letter.

If You Have Additional Evidence to Submit

Please put your VA file number on the first page of every document you send us.

Complete, sign, and return the enclosed VA Form 21-4142, Authorization and Consent to Release Information. We need this form so we can get your records hm any non-government medical source which we do not already have.

Where Should You Send the Evidence?

Please send the evidence to this address:

Department of Veterans' Affairs
Los Angeles Regional Office (344/216)
11000 Wilshire Blvd.
Los Angeles, CA 90024

How Soon Should You Send It?

Please send us what we need within 30 days of the date of this letter, or we may process your claim based only on what we already have.

Can You Take Longer Than 30 Days to Send Us What We Need?

If you need more time to provide this information, please contact us right away. You can e-mail us, phone us or write. We will allow you a reasonable amount of time to provide this information. We will also try to help you get any additional information if you tell us about it. If we don't hear from you within 30 days, we will continue processing your appeal based on the evidence we have.

How Can You Contact Us?

You can contact us in several ways. Please let us know your VA file number, C-13 575 481, when you contact us.

- Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.
- E-mail or visit our web site. For specific information about your claim, e-mail us at

LAClaim@VBA.VA.Gov. For general information about benefits, visit our web site at www.va.gov.

- Write to us at the address at the top of this letter.

We have also enclosed information on the status of your claim and how you can help, and what the evidence must show. A copy of this letter was sent to your representative. If you have questions or need assistance completing forms/claims, etc., you can also contact them.

We are trying to decide remands as quickly as possible.

We appreciate your help.

Sincerely yours,

/s/ RICHARD C. HADDOCK
RICHARD C. HADDOCK
Veterans Service Center Manager

Email us at: LAClaims@VBA.VA.Gov be sure to include your name and VA Claim number

Confidential information sent via e-mail may not be secure

Enclosures:

The Status of Your Claim and How You Can Help
What the Evidence Must Show
VA Form 21-4142

cc: Mark R. Lippmann
Attorney at Law
8070 La Jolla Shores Dr #437
La Jolla, CA 92037

What Is the Status of Your Claim and How You Can Help

We want to update you about the supporting documentation we need for your claim.

We have received the following:

- Service Medical Records
- Service Records (DD Form 214)
- VA treatment records from VA Greater Los Angeles Healthcare System, Bakersfield Community Based Outpatient Clinic
- The results of your VA examination

How Can You Help VA?

You must give us enough information about your records so that we can request them from the person or agency that has them. If the holder of the records declines to give us the records or asks for a fee to provide them, we'll notify you of the problem. *It's your responsibility to make sure that* we *receive all requested records that aren't in the possession of a Federal department or agency.*

What the Evidence Must Show

To support the claim for service connected compensation benefits, the evidence must show three things:

1. You had an injury in military service or a disease that began in or was made worse during military service, or that there was an event in service which caused injury or disease.

2. You have a current physical or mental disability. Medical evidence, including a VA examination will show this.
3. There is a relationship between your current disability and an injury, disease, or event in military service. Medical records or medical opinions usually show this relationship. However, under certain circumstances, VA may conclude that certain current disabilities were caused by service, even if there is no specific evidence proving this in your particular claim. The relationship is presumed for these veterans who have certain diseases:
   - former prisoners of war
   - veterans who have certain chronic or tropical diseases which become evident within a specific period of time after discharge from service
   - veterans who were exposed to ionizing radiation, mustard gas, or Lewisite while in service
   - veterans who served in Vietnam or in Southwest Asia during the Gulf War

Veterans who have certain kinds of service/ disease combinations may qualify for an automatic presumption of service connection.

How Will VA Help You Obtain Evidence for Your Claim?

This letter tells you what records or evidence we need to support the benefit you claimed. If they are needed for your claim, we're requesting all records held by Federal agencies to include your service medical records or other military records, and medical records

at VA hospitals. We're making reasonable efforts to help you get private records or evidence necessary to support your claim. We'll tell you if we are unable to get records that we requested. We'll also assist you by providing a medical examination or getting a medical opinion if we decide it's necessary to make a decision on your claim.

DEPARTMENT OF VETERANS AFFAIRS
Department of Veterans Affairs
251 N. Main Street
Winston-Salem NC 27155

[FEB 11 2003]

	In Reply Refer To:
PATRICIA D. SIMMONS	318/213
[REDACTED]	046623412
BOSTIC NC 28018	PATRICIA D. SIMMONS

Dear Patricia D. Simmons:

This is in further reference to the appeal you have filed from our decision on your claim for benefits. It is not a decision on the appeal you have initiated. It is a Supplemental Statement of the Case which contains changes or additions to the original Statement of the Case sent to you on October 12, 1999. A previous Supplemental Statement of the Case was sent on October 11, 2000.

Before returning your records to the Board of Veterans' Appeals, we are giving you a period of 60 days to make any comment you wish concerning the additional information. A response at this time is optional. If we receive no additional information from you within 60 days, we will return your records to the Board of Veterans' Appeals for review of the issues on appeal, and the Board of Veterans' Appeals will provide you with a copy of its decision. If you feel that you have stated your case

completely, you should let us know so that we may forward your appeal to the Board without waiting for the 60-day period to expire.

Sincerely yours,

/s/ L.H. HENDERSON
L. H. HENDERSON
Service Center Manager

CC: NCDVA

Supplemental Statement of the Case	***Department of Veterans Affairs Winston-Salem Regional Office***		02/07/2003
NAME OF VETERAN Patricia D. Simmons	VA FILE NUMBER 046623412	SOCIAL SECURITY NR **[REDACTED]**	POA NCDVA

ISSUE:

1. Evaluation of hearing loss, left ear
2. Service connection for hearing loss, right ear.

EVIDENCE:

- Treatment record, Patrick W. Ferguson, MD dated 05-01-01
- Lay statement Catherine Davis received 05-22-01
- VA Medical Center Salisbury audiometric testing dated 07-05-01
- Notification of failure to report for ENT examination scheduled for 01-23-02
- Statement from the veteran received 04-02-02 indicating she did not receive notification and indicated willingness to report for scheduled examination
- Notification of failure to report for ENT evaluation scheduled for 11-25-02

ADJUDICATIVE ACTIONS:

10-11-2000	The veteran was furnished a Supplemental Statement of the Case outlining actions taken on the claim.
02-28-2001	The appeal was remanded by the Board of Veterans' Appeals for develop for any additional treatment records not already associated with the claims file and medical evaluation with opinion.
03-08-2001	Letter to the veteran regarding duty to assist provisions under the Veteran's Claims Assistance Act of 2000 dated April 4, 2001.
02-15-2002	Letter to veteran regarding failure to report for scheduled evaluation of 01-23-02.
12-27-2002	Letter to veteran regarding failure to report for scheduled examination of 11-5-02.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol "§" denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

§3.655 Failure to report for Department of Veterans Affairs examination.

(a) General. When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination and a claimant, without good cause, fails to report for such

examination, or reexamination, action shall be taken in accordance with paragraph (b) or (c) of this section as appropriate. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc. For purposes of this section, the terms "examination" and "reexamination" include periods of hospital observation when required by VA.

(b) Original or reopened claim, or claim for increase. When a claimant fails to report for an examination scheduled in conjunction with an original compensation claim, the claim shall be rated based on the evidence of record. When the examination was scheduled in conjunction with any other original claim, a reopened claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied.

(c) Running award.

(1) When a claimant fails to report for a reexamination and the issue is continuing entitlement, VA shall issue a pre-termination notice advising the payee that payment for the disability or disabilities for which there examination was scheduled will be discontinued or, if a minimum evaluation is established in part 4 of this title or there is an evaluation protected under §3.951(b) of this part, reduced to the lower evaluation. Such notice shall also include the prospective date of discontinuance or reduction, the reason therefor and a statement of the claimant's procedural and appellate rights. The claimant shall be allowed 60 days to indicate his or her willingness to report for a reexamination or to present evidence that payment for the disability or disabilities for which the reexamination was scheduled should not be discontinued or reduced.

(2) If there is no response within 60 days, or if the evidence submitted does not establish continued entitlement, payment for such disability or disabilities shall be discontinued or reduced as of the date indicated in the pre-termination notice or the date of last payment, whichever is later.

(3) If notice is received that the claimant is willing to report for a reexamination before payment has been discontinued or reduced, action to adjust payment shall be deferred. The reexamination shall be rescheduled and the claimant notified that failure to report for the rescheduled examination shall be cause for immediate discontinuance or reduction of payment. When a claimant fails to report for such rescheduled examination, payment shall be reduced or discontinued as of the date of last payment and shall not be further adjusted until a VA examination has been conducted and the report reviewed.

(4) If within 30 days of a pre-termination notice issued under paragraph (c)(l) of this section the claimant requests a hearing, action to adjust payment shall be deferred as set forthin §3.105(h)(1) of this part. If a hearing is requested more than 30 days after such pre-termination notice but before the proposed date of discontinuance or reduction, a hearing shall be scheduled, but payment shall nevertheless be discontinued or reduced as of the date proposed in the pre-termination notice or date of last payment, whichever is later, unless information is presented which warrants a different determination. When the claimant has also expressed willingness to report for an examination, however, the provisions of paragraph (c)(3) of this section shall apply. (Authority: 38 U.S.C. 501(a)).

DECISION:

1. Evaluation of hearing loss, left ear, currently evaluated as 0 percent disabling; is continued.
2. Service connection for hearing loss, right ear, remains denied.

REASONS AND BASES:

1. Evaluation of hearing loss, left ear.

Treatment record, Patrick W. Ferguson, MD dated 05-01-01 is an audiogram which indicates moderate to severe mixed hearing loss of the left ear which he has noted is mostly conductive. Examination shows speech discrimination of 84 percent in the left ear and an average decibel loss of 100. The examiner indicated the veteran has opted not to pursue surgical correction.

Lay statement Catherine Davis received 05-22-01 indicates her twin sister has difficulty hearing without use of any aides and even then still has difficulties. Her sister needs assistance with phone calls, meetings, phone calls and other settings and also relies on lip reading. Ms. Davis notes that she and her other 4 siblings, other than the veteran, have perfect hearing.

VA Medical Center Salisbury audiometric testing dated 07-05-01 notes examination findings show the pure tone thresholds for the left ear at 1000 Hertz (Hz) is 65, with a 6S decibel (dB) loss at 2000, a 80 dB loss at 3000, and a 85 dB loss at 4000. The average loss is 74 decibels in the left ear. Table VIa under 38 CFR 4.85 provides a roman numeral VI for the left ear based on its pure tone threshold average. 38 CFR 4.86(a) applies for the left ear. The left ear is considered the poorer ear for 38 CFR 4.85's Table VII. Since the right ear is not service connected, a roman numeral VI is used in Table VII of

38 CFR 4.85. A 0 percent evaluation is derived from Table VII of 38 CFR 4.85 by intersecting row I, the better ear, with column VI, the poorer ear.
VA Medical Center Salisbury audiometric testing dated 08-21-02 examination findings show the left ear with 76 percent speech discrimination. Decibel (dB) loss at the puretone threshold of 1000 Hertz (Hz) is 50, with a 45 dB loss at 2000 Hz. a 45 dB loss at 3000 Hz, and a 35 dB loss at 4000 Hz. The average decibel loss is 44 in the left ear. From Table VI of 38 CFR 4.85, Roman Numeral III is derived for the left ear. This is determined by intersecting the percent of speech discrimination row with the puretone threshold average column. The left ear is considered the poorer ear for 38 CFR 4.85's Table VII. Since the right ear is not service connected, a roman numeral I is used in Table VII of 38 CFR 4.85. A 0 percent evaluation is derived from Table VII of 38 CFR 4.85 by intersecting row I, the better ear, with column III, the poorer ear.

The examiner noted there was no significant change in hearing levels since he previous testing of 07-05-01

[Charts Omitted]

Evaluation of hearing loss, left ear, currently evaluated as 0 percent disabling, is continued.

An evaluation of 0 percent is assigned when ever the percentage of discrimination in one ear is between 76 and 82 with an average puretone decibel loss which is over 97, and any loss of hearing in the other ear is not service connected.

Since the right ear remains not service connected, and based on the hearing loss tables in the VA Schedule for Rating Disabilities, the veteran's hearing loss is considered 0 percent disabling for VA compensation purposes.

This issue remains on appeal.

2. Service connection for hearing loss, right ear.

The claimant failed to report for a VA examination scheduled for 11-25-02. Evidence expected from this examination which might have been material to the outcome of this claim could not be considered.

Treatment record, Patrick W. Ferguson, MD dated 05-01-01 is an audiogram which indicates speech discrimination of the right ear is 100 percent and an average decibel loss of 80.

Lay statement Catherine Davis received 05-22-01 indicates her twin sister has difficulty hearing without use of any aides and even then still has difficulties. Her sister needs assistance with phone calls, meetings, phone calls and other settings and also relies on lip reading. Ms. Davis notes that she and her other 4 siblings other than the veteran, have perfect hearing.

VA Medical Center Salisbury audiometric testing dated 07-05-01 notes a speech discrimination of 92 percent in the right ear with an average decibel loss of 44. The examiner noted the overall audiometric pattern is consistent with middle ear pathology, ossicular fixation and suggestive of otosclerosis. The examiner further commented that for a medical opinion of the loss including a more definitive medical diagnosis, a physician should examine the veteran.

VA Medical Center Salisbury audiometric testing dated 08-21-02 notes speech recognition as 44 percent with an average decibel loss of 44. The examiner again noted results are consistent with ossicular fixation and suggestive of otosclerosis.

The veteran was scheduled for an ENT evaluation by a physician including a medical opinion 01-23-02. A statement from the veteran received 04-02-02 indicated she did not receive the notification and requested the examination to be rescheduled. An appointment was re-scheduled for 11-05-02, however she did not report for the appointment. A letter dated 12-27-02 was sent to the veteran regarding failure to report for scheduled examination of 11-05-02. As of the date of this document, no response has been received from the veteran.

Service connection for hearing loss, right ear, remains denied.

Service connection may be granted for a disease or injury which began or was incurred during active military service or active duty for training, or for an injury incurred during inactive duty for training. Additionally, service connection may be granted for specific diseases or conditions which are, by law, presumed to have been incurred during service if manifested to a compensable degree within a specified period of time, generally one year. Service connection may also be granted for conditions which existed prior to service if the condition is shown to have been aggravated by service.

There is no objective medical evidence to support that the hearing loss of the right ear started in service, was aggravated in service or is the result of the service connected left ear hearing loss.

This issue remains on appeal.

PREPARED BY /s/ J. EDGIL-ROGERS
J. EDGIL-ROGERS

APPROVED BY /s/ ILLEGIBLE

DEPARTMENT OF VETERANS AFFAIRS
Winton-Salem Regional Office
251 North Main Street
Winston-Salem NC 27155

March 8, 2001

PATRICIA D. SIMMONS
[REDACTED]

In Reply Refer To: 318/213/jek
CSS 046 62 3412
SIMMONS, Patricia D

Dear Mr. Simmons:

On November 9, 2000, The Veterans Claims Assistance Act of 2000 (VCAA) was signed into law. This law establishes new duties for the Department of Veterans Affairs (VA) when you file an application for disability benefits.

The purpose of this letter is to notify you about this new law. We also want you to know that we will help you get evidence to support your recent claim for benefits. In this letter we will tell you what evidence is necessary to establish entitlement, what information or evidence we still need from you, and what you can do to help with your claim. It will also tell you when and where to send the information or evidence, what has been done to help with your claim. and who to call if your have questions or need assistance.

We are processing the Board of Veterans' Appeals (BVA) Remand dated February 28, 2001, which identi-

fied other issues to be adjudicated subsequent to appellate jurisdiction. The information you submit should be new and material to your claim.

VA's Duty To Notify You About Your Claim

The VCAA requires us to explain to you what information or evidence we need to grant the benefit you want. We will tell you when medical evidence is required. Medical evidence includes such things as doctors' records, medical diagnoses, and medical opinions.

We will tell you what necessary information or evidence you must give us, such as income information, or the names and addresses of doctors who treated you for your medical condition. We will also tell you what necessary information or evidence we will try to get for you.

VA's Duty To Assist You Obtain Evidence For Your Claim

The law states that we must make reasonable efforts to help you get evidence necessary to support your claim. We will try to help you get such things as medical records, employment records, or records, from other Federal agencies. You must give us enough information about these records so that we can request them from the person or agency who has them. It's still your responsibility to make sure these records are received by us.

We will also assist you by providing a medical examination or getting a medical opinion if we decide it's necessary to make a decision on your claim.

What Must The Evidence Show To Establish Entitlement?

To establish entitlement for service connected compensation benefits, the evidence must show three things:

- *An injury in military service or a disease that began in or was made worse during military service, or an event in service causing injury or disease.* If we do not yet have them, we will get service medical records and will review them to see if they show you had an injury or disease in service. We will also get other military service records if they are necessary.

OR

For certain conditions, you don't have to show that you had an injury or disease in service. These are called "presumptive conditions." These are medical conditions that were first shown, after service, not during service. For most of these conditions, the evidence must show that you were diagnosed with the condition within one year after you left military service. Longer time limits apply for certain other medical conditions.

- *A current physical or mental disability.* This can be shown by medical evidence or other evidence showing you have persistent or recurrent symptoms of disability. We will get any VA medical records or other medical treatment records you tell us about. If necessary, we may schedule a VA examination for you to get this evidence. You may also submit your own state-

ments or statements from other people describing your physical or mental disability symptoms. We will review this evidence to see if it shows you have a current disability or symptoms of a disability.

- *A relationship between your current disability and an injury, disease, or event in service.* This is usually shown by medical records or medical opinions. We will request this medical evidence for you if you tell us about it. If appropriate, we may also try to get this evidence for you by requesting a medical opinion from a VA doctor or you can give us a medical opinion from your own doctor.

What Has Been Done To Help With Your Claim?

- We have obtained the following evidence to support your appeal for right and left ear hearing loss:

Evidence sited in previous rating decisions and (Supplemental) Statements of the Cases

Hearing test from NC Baptist Hospital dated 08-04-00

Hearing evaluations were requested from VAMC Asheville. Medical records received were duplicates of evidence previously considered, most recent of which was 03-24-98.

Medical record from MEPPS was a duplicate, and it has been returned to the veteran. Outpatient treatment reports from Asheville VA Medical Center for treatment from 11-8-88 through 6-24-98.

Service medical records

VA audiology examination dated 10-24-80

VA audiology examination dated 6-15-99

What Can You Do To Help With Your Claim?

You can help us with your appeal by doing the following:

- tell us about any additional information or evidence that you want us to try to get for you. Provide the names, addresses, and dates of treatment for health care providers who have treated you for your right and left ear.

What Information Or Evidence Do We Still Need From You?

You do not need to send us information that has already been submitted and considered by us. However, if you have any additional information that you want us to consider and it has not already been received by us, then please follow the instructions below.

You can get these records yourself and send them to us or you can sign a release that gives us the authority to request these documents for you.

- Complete, sign and return the enclosed VA Form 21-4142, "Authorization for Release of Information" for any non-VA doctor, hospital, or clinic where you received care for your claimed disabilities. Use a separate form for each doctor or hospital where you were treated. Be sure to include the full address of the care

provider, what the treatment was for, and the dates of treatment.

- The name and location of any VA medical facility where you received treatment for your claimed disabilities and the dates of treatment or hospitalization. Please show this information on the enclosed Statement on Support of Claim.

When And Where Do You Send The Information Or Evidence?

Send the information describing additional evidence or the evidence itself to the address at the top of this letter within 60 days from the date of this letter. Please put your full name and VA file number on the evidence. If we don't receive the information or evidence within that time, we will decide your claim based only on the evidence we have received and any VA examinations or medical opinions.

If the information or evidence is received within one year from the date of this letter, and we decide that you are entitled to VA benefits, we may be able to pay you from the date we received your claim.

If the evidence isn't received within one year from the date of this letter, and we decide that you are entitled to VA benefits, we can only pay you from the date we receive the evidence.

Do You Have Questions Or Need Assistance?

If you have any questions or need assistance with this claim, please call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.

If you call please refer to your VA file number which is listed at the top right hand corner of this letter. If you write to us, please put your full name and VA file number on the letter. You can visit our web site at ww.va.gov for more information about veterans' benefits.

A copy of this letter was sent to Service Organization. If you have questions or need assistance completing forms/claim, etc., you can also contact them.

Sincerely yours,

L.H. HENDERSON
Acting Veterans Service Center Manager

Enclosure(s): VA Form 214138
VA Form 2J4142(4)

cc: NCDVA

PETITIONER'S BRIEF

101

Supreme Court, U.S.
FILED
AUG 21 2008
OFFICE OF THE CLERK

(5)

No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERIC D. MILLER
Assistant to the Solicitor General
JEANNE E. DAVIDSON
TODD M. HUGHES
MARTIN F. HOCKEY, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

PAUL J. HUTTER
General Counsel
RICHARD J. HIPOLIT
Assistant General Counsel
DAVID J. BARRANS
MARTIE S. ADELMAN
Attorneys
Department of Veterans Affairs
Washington, D.C. 20420

QUESTION PRESENTED

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, requires the Department of Veterans Affairs (VA) to provide a notice to benefits claimants. Under 38 U.S.C. 7261(b)(2) (Supp. V 2005), review of administrative decisions resolving claims for veterans benefits must "take due account of the rule of prejudicial error." The question presented is:

Whether the court of appeals erred in holding that a failure of the VA to give the notice required by the VCAA must be presumed to be prejudicial.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 8
Argument:
A party challenging the denial of a veterans-benefits claim must show not only that the VA erred but also that its error was prejudicial 11
A. Like the corresponding provision of the APA, Section 7261(b)(2) should be construed to place the burden of showing prejudice on the party challenging agency action 11
1. Section 7261(b)(2) is materially identical to Section 706 and should be given the same construction 11
2. Under Section 706, the party challenging agency action bears the burden of showing that the agency erred and that its error was prejudicial 15
B. The court of appeals erred in creating a unique rule of prejudicial error applicable only to VA adjudications 18
1. The enactment of the VCAA did not alter the rule of prejudicial error set out in Section 7261(b)(2) 19
2. The nonadversarial nature of VA administrative proceedings provides no basis for an exception to the generally applicable rule of prejudicial error 24

Table of Contents—Continued: Page

3. The court of appeals erred in relying on the treatment of harmless error in criminal and habeas corpus proceedings 26
C. A presumption of prejudice from VCAA notice errors is unwarranted 30
1. VCAA notice errors do not have the natural effect of producing prejudice 31
2. A benefits claimant is in a better position than the VA to establish whether a VCAA notice error has caused prejudice 35
Conclusion 37
Appendix — Statutory provisions involved 1a

TABLE OF AUTHORITIES

Cases:

Air Canada v. *Department of Transp.*, 148 F.3d 1142 (D.C. Cir. 1998) 15, 17
American Airlines, Inc. v. *Department of Transp.*, 202 F.3d 788 (5th Cir.), cert. denied, 530 U.S. 1274, and 530 U.S. 1284 (2000) 15, 17
American Bus Ass'n v. *Slater*, 231 F.3d 1 (D.C. Cir. 2000) 13
American Coke & Coal Chems. Inst. v. *EPA*, 452 F.3d 930 (D.C. Cir. 2006) 17
American Mfrs. Mut. Ins. Co. v. *Sullivan*, 526 U.S. 40 (1999) 27
Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 13
Bar MK Ranches v. *Yuetter*, 994 F.2d 735 (10th Cir. 1993) 15

Cases—Continued: Page

Beef Nebraska, Inc. v. *United States*, 807 F.2d 712 (8th Cir. 1986) 15
Bobbitt v. *Principi*, 17 Vet. App. 547 (2004) 24
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 12
Brown v. *Gardner*, 513 U.S. 115 (1994) 23
Burkhart v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207 (D.C. Cir. 1997) 30
Campanale & Sons, Inc. v. *Evans*, 311 F.3d 109 (1st Cir. 2002) 15
Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 12
Cardelucci, In re, 285 F.3d 1231 (9th Cir.), cert. denied, 537 U.S. 1072 (2002) 13
Christiansom v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) 12
Cigna Ins. Co. v. *Oy Saunatec, Ltd.*, 241 F.3d 1 (1st Cir. 2001) 30
City of Camden v. *United States Dep't of Labor*, 831 F.2d 449 (3rd Cir. 1987) 15
City of Frankfort v. *FERC*, 678 F.2d 699 (7th Cir. 1982) 15
Conway v. *Principi*, 353 F.3d 1369 (Fed. Cir. 2004) ... 6, 19
Dickinson v. *Zurko*, 527 U.S. 150 (1999) 14
Director, Office of Workers' Comp. Programs v. *Greenwich Collieries*, 512 U.S. 267 (1994) 14
Disabled Am. Veterans v. *Secretary of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005), cert. denied, 547 U.S. 1162 (2006) 3, 34
Dresser-Rand Co. v. *Virtual Automation Inc.*, 361 F.3d 831 (5th Cir. 2004) 30

Cases—Continued: Page

Elkins v. *United States*, 364 U.S. 206 (1960) 35
FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940) 28
Fiswick v. *United States*, 329 U.S. 211 (1946) 27
Forshey v. *Principi*, 284 F.3d 1335 (Fed. Cir.), cert. denied, 537 U.S. 823 (2002) 24
Friends of Iwo Jima v. *National Capital Planning Comm'n*, 176 F.3d 768 (4th Cir. 1999) 15, 17
Holmes Group, Inc. v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) 12
Intercargo Ins. Co. v. *United States*, 83 F.3d 391 (Fed. Cir. 1996), cert. denied, 519 U.S. 1108 (1997) 15, 17
Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982) 15
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) 23
Kotteakos v. *United States*, 328 U.S. 750 (1946) 9, 15, 26, 27, 30
Kroger Co. v. *Regional Airport Auth.*, 286 F.3d 382 (6th Cir. 2002) 15
Lyng v. *Payne*, 476 U.S. 926 (1986) 27
Mayfield v. *Nicholson*:
499 F.3d 1317 (Fed. Cir. 2007) 21
444 F.3d 1328 (Fed. Cir. 2006) 21
19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006) 5, 7, 22
McKnight v. *Gober*, 131 F.3d 1483 (Fed. Cir. 1997) 21
Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71 (2006) 8, 12

Cases—Continued: Page

Morrison Knudsen Corp. v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221 (10th Cir. 1999) 29
Morton v. *West*, 12 Vet. App. 477 (1999), withdrawn, 14 Vet. App. 174 (2000) 20, 21
National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 19
National Cable & Telecomms. Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002) 20
Nelson v. *Apfel*, 131 F.3d 1228 (7th Cir. 1997) 25
NLRB v. *Seine & Line Fishermen's Union*, 374 F.2d 974 (9th Cir.), cert. denied, 389 U.S. 913 (1967) ... 15, 16
Obrey v. *Johnson*, 400 F.3d 691 (9th Cir. 2005) 30
O'Neal v. *McAninch*, 513 U.S. 432 (1995) 10, 15, 26, 27, 28, 29
Palmer v. *Hoffman*, 318 U.S. 109 (1943) 16, 27
Piamba Cortes v. *American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999), cert. denied, 528 U.S. 1136 (2000) 30
Qualley v. *Clo-Tex Intern., Inc.*, 212 F.3d 1123 (8th Cir. 2000) 30
Rogers v. *City of Chi.*, 320 F.3d 748 (7th Cir. 2003) 30
Rumsfeld v. *Padilla*, 542 U.S. 426 (2004) 12
Shannon v. *Chater*, 54 F.3d 484 (8th Cir. 1995) 25
Shepard v. *NLRB*, 459 U.S. 344 (1983) 25
Sierra Club v. *United States Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001) 15
Sims v. *Apfel*, 530 U.S. 103 (2000) 25
Sprint Corp. v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003) 16
Tesser v. *Board of Educ. of the City Sch. Dist.*, 370 F.3d 314 (2d Cir. 2004) 29

Cases—Continued: Page

Thurber v. *Brown*, 5 Vet. App. 119 (1993) 31
United States v. *Fior d' Italia, Inc.*, 536 U.S. 238 (2002) 36
United States v. *Rybicki*, 354 F.3d 124 (2003), cert. denied, 543 U.S. 809 (2004) 13
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 14
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 24
Warner-Lambert Co. v. *Apotex Corp.*, 316 F.3d 1348 (Fed. Cir. 2003) 13
Watts, In re, 354 F.3d 1362 (Fed. Cir. 2004) 30

Constitution, statutes, regulations and rule:

U.S. Const. Art. I 3
Administrative Procedure Act, 5 U.S.C. 706 ..... *passim*
Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832 (38 U.S.C. 7261(b)(2) (Supp. V 2005)) 11
Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 2
§ 3(a), 114 Stat. 2096 20
§ 3(a), 114 Stat. 2096 (38 U.S.C. 5103(a)) 2
Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105:
§ 103, 102 Stat. 4107 (38 U.S.C. 5107(b)) 22
§ 203(a), 102 Stat. 4110 (38 U.S.C. 7104(a)) 23
§ 205, 102 Stat. 4111 (38 U.S.C. 7104(d)) 23
§ 301(a), 102 Stat. 4115 (38 U.S.C. 7261(a)(1)-(3)) .. 11

Statutes, regulations and rule—Continued: Page

§ 301(a), 102 Stat. 4115, amended by Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832 (38 U.S.C. 7261(b)(2) (Supp. V 2005)) 11
11 U.S.C. 726(a)(5) 13
28 U.S.C. 391 (1940) 26, 27, 28
28 U.S.C. 2111 ..... 26, 28, 29
38 U.S.C. 301(c)(5) 3
38 U.S.C. 5100 *et seq.* 2
38 U.S.C. 5103 (2000 & Supp. V 2005) 20
38 U.S.C. 5103(a) (1994) 21
38 U.S.C. 5103(a) 5, 30, 31, 32, 34
38 U.S.C. 5103A 3
38 U.S.C. 5103A(b) 32
38 U.S.C. 5103A(b)(3) 32
38 U.S.C. 5103A(c) 32
38 U.S.C. 5103A(c)(3) 32
38 U.S.C. 5103A(d) 32
38 U.S.C. 5104(b) 3, 33
38 U.S.C. 5109B (Supp. V 2005) 36
38 U.S.C. 7101 *et seq.* 3
38 U.S.C. 7105(d)(1) 33
38 U.S.C. 7107(b) 3, 34
38 U.S.C. 7109(a) 3, 34
38 U.S.C. 7112 (Supp. V 2005) 36
38 U.S.C. 7252 3
38 U.S.C. 7261(a)(1) 3
38 U.S.C. 7261(a)(4) (Supp. V 2005) 3

Statutes, regulation and rule—Continued: Page

38 U.S.C. 7261(b) 16
38 U.S.C. 7261(b)(2) (Supp. V 2005) ..... *passim*
38 U.S.C. 7292 (2000 & Supp. V 2005) 4
38 C.F.R.:
Section 3.103(b)(1) 3, 33
Section 3.103(c) 3, 33
Section 3.103(c)(1) 32
Section 3.103(c)(2) 32, 33
Section 3.159 2
Section 3.159(b)(1) 2
Section 3.2600(c) 33
Section 3.2600(d) 33
Section 19.9 ..... 3, 34
Section 19.31(a) 33
Section 20.302(c) 33
Section 20.700(b) 34
Section 20.1304(c) 3, 34
Fed. R. Civ. P. 61 29

Miscellaneous:

146 Cong. Rec. (2000):
p. 19,229 21
p. 22,886 21

Miscellaneous—Continued: Page

Examining the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the Subcomm. on Disability Assiatance and Mem'l Affairs of the House Comm. On Veterans' Affairs, 110th Cong., 2d Sess. <http://veterans.house.gov/hearings/ Testimony_Print.aspx?newsid=189&Name= _Michael__Walcoff> 37

73 Fed. Reg. (2008):

p. 23,353 2

p. 23,354 2

p. 23,356 2

H.R. Rep. No. 913, 65th Cong., 3d Sess. (1919) ... 26, 27, 30

H.R. Rep. No. 781, 106th Cong., 2d Sess. (2000) 20, 21

S. Rep. No. 418, 100th Cong., 2d Sess. (1988) .. 6, 14, 16, 23

S. Rep. No. 397, 106th Cong., 2d Sess. (2000) 21

U.S. Court of Appeals for Veterans Claims, *Annual Reports* <http://www.vetapp.gov/documents/Annual_Reports_2007.pdf> 25

In the Supreme Court of the United States

No. 07-1209

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-21a, 56a-64a) are reported at 487 F.3d 881 and 487 F.3d 892. The decisions of the United States Court of Appeals for Veterans Claims (Pet. App. 24a-39a, 67a-82a) are unreported. The decisions of the Board of Veterans' Appeals (Pet. App. 40a-55a, 83a-96a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on May 16, 2007. Petitions for rehearing were denied on October 23 and 24, 2007 (Pet. App. 22a-23a, 65a-66a). On January 14, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 2008. On February 8,

2008, the Chief Justice further extended the time to March 21, 2008, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 16, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. Veterans who wish to claim benefits must submit an application to the Department of Veterans Affairs (VA). See 38 U.S.C. 5100 *et seq.* Under the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, the VA is required to assist veterans in developing claims. Specifically, the VCAA directs that, "[u]pon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." § 3(a), 114 Stat. 2096-2097 (38 U.S.C. 5103(a)). The notice must also "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary * * * will attempt to obtain on behalf of the claimant." *Id.* at 2097 (38 U.S.C. 5103(a)); see 38 C.F.R. 3.159.[1]

---

[1] At the time of the decisions below, 38 C.F.R. 3.159(b)(1) provided that the "VA will also request that the claimant provide any evidence in the claimant's possession that pertains to the claim." In April 2008, the regulation was amended to eliminate that requirement. See 73 Fed. Reg. 23,353, 23,354, 23,356.

The initial decision on a benefits claim is issued by a VA regional office. See *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 419 F.3d 1317, 1318 (Fed. Cir. 2005), cert. denied, 547 U.S. 1162 (2006). In addition to providing the notice required by the VCAA, the regional office must assist the claimant by obtaining public and private records relevant to the claim and by providing a medical examination when appropriate. See 38 U.S.C. 5103A. The claimant is also entitled to a hearing for the purpose of presenting additional evidence and arguments. See 38 C.F.R. 3.103(c). If the regional office denies a claim, it must provide the claimant a statement of the reasons for its decision and a summary of the evidence that was considered. See 38 U.S.C. 5104(b); 38 C.F.R. 3.103(b)(1).

A claimant may appeal an adverse decision of the regional office to the Board of Veterans' Appeals (Board), which is a component of the VA. See 38 U.S.C. 301(c)(5), 7101 *et seq.* In certain circumstances, the Board may consider new evidence itself. See, *e.g.*, 38 U.S.C. 7107(b), 7109(a); 38 C.F.R. 20.1304(c). When necessary, it may also remand a case to the regional office. See 38 C.F.R. 19.9.

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court. See 38 U.S.C. 7252. The Veterans Court has authority to "decide all relevant questions of law" and to set aside administrative factual findings that are "clearly erroneous." 38 U.S.C. 7261(a)(1); 38 U.S.C. 7261(a)(4) (Supp. V 2005). In reviewing a decision of the Board, the Veterans Court must "take due account of the rule of prejudicial error." 38 U.S.C. 7261(b)(2) (Supp. V 2005). Decisions of the Veterans Court are

subject to review in certain respects in the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over such cases. See 38 U.S.C. 7292 (2000 & Supp. V 2005).

2. a. Respondent Sanders served in the United States Army from 1942 to 1945. In 1948, he filed a claim with a VA regional office, alleging that an eye condition from which he suffered had been caused by an injury sustained during his service. The claim was denied, and Sanders did not appeal. In 1991, Sanders sought to reopen his claim, relying upon statements from two ophthalmologists. The VA reopened the claim and obtained additional evidence, including a report from a VA ophthalmologist, but it ultimately denied the claim. Pet. App. 2a-5a, 25a.

The Board affirmed. Pet. App. 40a-55a. The Board noted that the medical opinions on which Sanders relied were "offered in * * * speculative language and without the benefit of consideration of relevant medical evidence." *Id.* at 54a. Conversely, the VA ophthalmologist had "affirmatively opine[d] that [Sanders] did not lose right eye vision during service or due to the alleged in-service trauma," but that his eye condition was "most likely infectious in nature." *Id.* at 54a-55a. The Board found that opinion "to be more probative" than those of the other physicians. *Id.* at 55a. It therefore concluded that "the preponderance of the evidence [was] against" Sanders's claim that his eye condition was connected to his military service. *Ibid.*

b. Sanders appealed to the Veterans Court, arguing, among other things, that the VA had not complied with the VCAA because it had "failed to provide notice of who would ultimately be responsible for obtaining evidence necessary to substantiate the claim" and had "failed to

provide proper notice before the initial unfavorable decision by the agency." Pet. App. 38a. The court rejected that argument and affirmed the administrative decision. *Id.* at 24a-39a.

The Veterans Court applied the framework for evaluating VCAA notice errors that it had adopted in *Mayfield* v. *Nicholson*, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006). Under *Mayfield*, a failure to inform a claimant of what evidence is necessary to substantiate his or her claim—an error that the Veterans Court referred to as a "first-element" notice error—was presumptively prejudicial. See *id.* at 122-123. But *Mayfield* held that errors in providing the other elements of the notice required by Section 5103(a) were a basis for reversal only if the appellant "identif[ied], with considerable specificity, how the notice was defective and what evidence the appellant would have provided or requested the Secretary to obtain" if appropriate notice had been given, and only if the appellant could "assert, again with considerable specificity, how the lack of that notice and evidence affected the essential fairness of the adjudication." *Id.* at 121.[2]

Because Sanders did not allege a first-element notice error, and because he did not explain how he was prejudiced by the alleged failure of notice, the Veterans Court affirmed the Board's decision denying benefits. Pet. App. 38a. The court did not determine whether any notice error had occurred. *Ibid.*

c. The court of appeals reversed. Pet. App. 1a-21a. The court noted that Section 7261(b)(2) requires the

---

[2] Neither Section 5103(a) nor Section 7261(b)(2) indicates that errors affecting what the Veterans Court characterized as different "elements" of the notice should be evaluated differently. This brief does not distinguish among the different notice elements.

Veterans Court to "take due account of the rule of prejudicial error," even when evaluating claims that the VA has erred in giving the notice required by the VCAA. *Id.* at 9a; see *Conway* v. *Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). But the court held that every VCAA notice error should be "presumed prejudicial, requiring reversal unless the VA can show that the error did not affect the essential fairness of the adjudication," which it can do "by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." Pet. App. 14a-15a.

The court of appeals acknowledged the existence of legislative history indicating that Section 7261(b)(2) was intended to incorporate the prejudicial-error rule of the Administrative Procedure Act (APA) (5 U.S.C. 706), which is virtually identical to Section 7261(b)(2). Pet. App. 20a; see S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988). The court nevertheless held that "the treatment of prejudicial error under the APA is not dispositive," because "[e]ven if Congress had previously intended veterans' claims notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent passage of the VCAA." Pet. App. 20a-21a. In the view of the court of appeals, "requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

3. a. Respondent Simmons served in the United States Navy from 1978 to 1980. Pet. App. 57a. Upon her discharge, Simmons filed a claim for disability benefits

based on hearing loss in her left ear, but the VA regional office concluded that the degree of hearing loss did not warrant compensation. *Ibid.* In 1998, she asked the VA to reopen her claim and to add a claim for compensation based on hearing loss in her right ear. *Ibid.* The regional office again denied her claim, but the Board remanded, directing the regional office to comply with the notice requirements of the VCAA, which had just gone into effect. *Ibid.* On remand, the regional office again denied the claim. *Ibid.* The Board affirmed, concluding that Simmons's left-ear hearing loss was not sufficiently severe to warrant benefits, see *id.* at 95a, and that there was no "competent evidence of a nexus between the current right ear hearing loss" and Simmons's service, *id.* at 94a.

b. Simmons appealed to the Veterans Court, which reversed the Board's decision. Pet. App. 67a-82a. The Veterans Court determined that the VA had failed to give Simmons notice "of the evidentiary prerequisites for establishing" her claim of left-ear hearing loss, as required by the VCAA. *Id.* at 78a. Because that error was a "first-element" notice error, the court applied a presumption of prejudice, and it imposed on the Secretary the burden of showing "that there was clearly no prejudice" to Simmons as a result of the failure to provide notice of the evidence necessary to substantiate her claim. *Id.* at 80a (quoting *Mayfield*, 19 Vet. App. at 122). The court concluded that the VA had failed to carry its burden because there was no evidence that Simmons had actual knowledge of the evidence needed to substantiate her claim or that a reasonable person would have been aware of what evidence was needed to substantiate the claim. *Id.* at 81a. It therefore held that a remand

was required for Simmons's claim of left-ear hearing loss. *Ibid.*[3]

c. The Secretary appealed, and the court of appeals affirmed. Pet. App. 56a-64a. The court stated that "[o]ur opinion in *Sanders* resolves this issue" because it holds that "once the veteran establishes that the VA has committed a VCAA notice error, the Veterans Court should presume that such error was prejudicial." *Id.* at 63a.

4. The court of appeals denied petitions for rehearing en banc. Pet. App. 22a-23a, 65a-66a.

SUMMARY OF ARGUMENT

Congress directed the Veterans Court to "take due account of the rule of prejudicial error" in reviewing administrative decisions denying veterans' benefits. 38 U.S.C. 7261(b)(2) (Supp. V 2005). It did so by adopting, almost verbatim, the language of the APA's prejudicial-error rule. 5 U.S.C. 706. That rule has long been understood to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial. The court of appeals erred by disregarding that settled interpretation of essentially the same statutory language, creating a presumption of prejudice, and imposing on the VA the burden of overcoming that presumption.

This Court has held that when Congress enacts a statute using language whose interpretation by courts is already settled, it is presumed to have intended to incorporate that interpretation. See *Merrill Lynch, Pierce,*

---

[3] The Veterans Court also held that the VA had failed to inform Simmons of a scheduled VA medical examination of her right ear. Pet. App. 76a. It remanded that claim to the Board with instructions to "ensure that a new VA medical examination is provided." *Ibid.*

Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71, 85-86 (2006). Applying that principle, the similarity of the language of Section 7261(b)(2) and Section 706, coupled with the well-settled interpretation of Section 706 at the time Section 7261(b)(2) was enacted, suffices to resolve this case. That conclusion is reinforced by legislative history demonstrating that, when Congress enacted Section 7261(b)(2), it intended the review by the Veterans Court to parallel review under the APA, and it understood that the APA's prejudicial-error rule imposes the burden of showing prejudice on the party challenging the agency's action.

Nothing in the text or history of Section 7261(b)(2) authorized the Federal Circuit to override the well-established interpretation of the rule of prejudicial error through the creation of a presumption of prejudice for Veterans Claims Assistance Act notice errors. Nor, contrary to the reasoning of the court of appeals, is there any basis for divining such a presumption from the text or history of the VCAA itself. That statute was simply a reaffirmation and clarification of the VA's existing claims-handling procedures, and it did not amend Section 7261(b)(2) in any way. Although the VCAA described the VA's duty to assist claimants in greater detail than prior law, it did not fundamentally alter the existing process for handling claims. Similarly, the nonadversarial nature of the VA administrative process provides no basis for abandoning ordinary principles of prejudicial error when VA administrative decisions are challenged in court, because Veterans Court review of benefits claims, like other judicial proceedings, is adversarial.

The court of appeals was similarly unjustified in claiming to find support for its decisions in *Kotteakos* v.

United States, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Those cases concerned the standard of harmless-error review in criminal and habeas corpus proceedings. Such proceedings—in which an individual's liberty is at stake—are far removed from the benefits determinations at issue here and the other types of administrative determinations to which the rule of prejudicial error in Section 706 and Section 7261(b)(2) expressly applies. *Kotteakos* and *O'Neal* are also inapposite because they considered the harmless-error rule in the context of review of trial proceedings in another *court*, which involves considerations not present in the context of judicial review of an administrative-agency determination.

Finally, even if the Veterans Court had discretion to decide whether to apply a presumption of prejudice, such a presumption would be inappropriate. VCAA notice errors do not have the natural effect of producing prejudice, because the VA adjudicative system—which includes many layers of review and obligates the VA to assist claimants in gathering evidence to support their claims—offers many opportunities to correct any error in providing the initial notice required by the VCAA. Moreover, the claimant is much more likely than is the VA to have access to information that would be relevant to determining whether prejudice occurred. Application of traditional principles of prejudicial-error review serves to provide relief to veterans who have actually been harmed by a VA error, while avoiding costly and unnecessary remands in cases of technical errors that did not affect the outcome of the proceeding.

ARGUMENT

A PARTY CHALLENGING THE DENIAL OF A VETERANS-BENEFITS CLAIM MUST SHOW NOT ONLY THAT THE VA ERRED BUT ALSO THAT ITS ERROR WAS PREJUDICIAL

A. Like The Corresponding Provision Of The APA, Section 7261(b)(2) Should Be Construed To Place The Burden Of Showing Prejudice On The Party Challenging Agency Action

Section 7261(b)(2) requires the Veterans Court to "take due account of the rule of prejudicial error." That statute parallels, and draws upon, the APA's prejudicial-error provision, which has long been understood to impose upon a party seeking to overturn an administrative decision the burden of establishing not only that the agency erred but also that its error was prejudicial. Moreover, the text and history of Section 7261(b)(2) make clear that, in enacting that provision, Congress intended to adopt the same rule of prejudicial error as that applied under the APA. The court of appeals erred in disregarding the settled construction of that materially identical statutory language.

1. Section 7261(b)(2) is materially identical to Section 706 and should be given the same construction

Section 7261(b)(2) was enacted in 1988 as part of the Veterans' Judicial Review Act. Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4115, amended by Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832. That statute defines the scope of the Veterans Court's review of VA decisions in terms paralleling the language of Section 706, which sets out the scope of judicial review of federal administrative actions generally. See § 301(a), 102 Stat. 4115 (38 U.S.C. 7261(a)(1)-(3)).

Significantly, in directing the Veterans Court to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2) (Supp. V 2005), Congress used language that is almost identical to that of Section 706, which provides that "due account shall be taken of the rule of prejudicial error" when courts review the actions of administrative agencies. 5 U.S.C. 706. "[L]inguistic consistency" therefore requires the Veterans Court to apply the same rule of prejudicial error as that applied by courts in cases governed by Section 706. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829-830 (2002) (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)).

a. This Court has held that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)); see *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-699 (1979). Applying that principle, Section 7261(b)(2) should be read to adopt the settled interpretation of the APA's rule of prejudicial error, rather than to establish a new rule uniquely applicable to appeals of veterans' benefit decisions.

That reading of the statute is reinforced by Congress's use of the word "the" in the phrase "the rule of prejudicial error." The use of the definite article demonstrates that Section 7261(b)(2) refers to a particular existing rule that was established and defined at the time the statute was enacted, and it forecloses any suggestion that Congress intended to establish a new, previously undefined rule. See *Rumsfeld* v. *Padilla*, 542 U.S.

426, 434 (2004) (The habeas statute's "consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition."); *Warner-Lambert Co.* v. *Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) (Because the definite article "particularizes the subject which it precedes," the statutory phrase "'the use' refers to a specific 'use' rather than a previously undefined 'use.'") (quoting *American Bus Ass'n* v. *Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000)); *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir.) (The use of the definite article in a statute calling for "interest at the legal rate" after the filing of a bankruptcy petition indicates "that Congress meant for a single source to be used to calculate post-petition interest.") (quoting 11 U.S.C. 726(a)(5)), cert. denied, 537 U.S. 1072 (2002); see also *United States* v. *Rybicki*, 354 F.3d 124, 137-138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004). In other words, Congress did not merely direct the Veterans Court to disregard non-prejudicial error; it directed that court to apply a specific and previously defined rule for determining whether an error is prejudicial—namely, "the rule" applied by courts in cases governed by Section 706.

b. The parallel statutory text of Section 7261(b)(2) and Section 706 leads to the conclusion that Section 7261(b)(2) unambiguously forecloses the interpretation reached by the Federal Circuit. There is accordingly no reason to delve deeper into the statutory record. See *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 301-302 (2006). But even if there were any doubt as to whether Section 7261(b)(2) required the Veterans Court to "take due account of the rule of prejudicial error" in the same manner in which "due account [is] taken of the rule of prejudicial error" under Section 706,

that doubt would be eliminated by the legislative history. The Senate Committee Report accompanying the Veterans' Judicial Review Act stated that the statute "would incorporate a reference to the 'rule of prejudicial error' as included in the APA (5 U.S.C. 706)." S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988); see *id.* at 60 (Although the "standard of review for factual findings is new, the other major scope of review provisions * * * are derived specifically from section 706 of the APA."). That report reinforces the conclusion that Congress intended to adopt the rule of prejudicial error already established and defined under Section 706.

c. Interpreting Section 7261(b)(2) to be consistent with Section 706 is particularly appropriate in light of "the importance of maintaining a uniform approach to judicial review of administrative action." *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999) (citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 489 (1951)). As this Court has observed, "[t]he APA was meant to bring uniformity to a field full of variation and diversity." *Id.* at 155. The decision of the court of appeals creates an unjustified anomaly in that it subjects the determinations of one federal agency to a standard of judicial review different from that applied to those of other agencies, whose decisions are reviewed under the general provisions of the APA. As explained below, the court of appeals erred in reallocating the parties' burdens in a manner inconsistent with the established APA rule and uniquely applicable to the VA. Cf. *Director, Office of Workers' Comp. Programs* v. *Greenwich Collieries*, 512 U.S. 267, 280-281 (1994).

2. *Under Section 706, the party challenging agency action bears the burden of showing that the agency erred and that its error was prejudicial*

The uniform view of the federal courts has been that Section 706 "requires the party asserting error to demonstrate prejudice from the error." *Air Canada* v. *Department of Transp.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998); accord *Campanale & Sons, Inc.* v. *Evans*, 311 F.3d 109, 127 (1st Cir. 2002); *American Airlines, Inc.* v. *Department of Transp.*, 202 F.3d 788, 797 (5th Cir.), cert. denied, 530 U.S. 1274, and 530 U.S. 1284 (2000); *Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999); *Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 394 (Fed. Cir. 1996), cert. denied, 519 U.S. 1108 (1997); *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *City of Camden* v. *United States Dep't of Labor*, 831 F.2d 449, 451 (3rd Cir. 1987); *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir.), cert. denied, 389 U.S. 913 (1967); cf. *Kroger Co.* v. *Regional Airport Auth.*, 286 F.3d 382, 389 (6th Cir. 2002); *Beef Nebraska, Inc.* v. *United States*, 807 F.2d 712, 714 n.1 (8th Cir. 1986); *City of Frankfort* v. *FERC*, 678 F.2d 699, 708 (7th Cir. 1982).[4]

---

[4] Respondent Simmons suggests (Br. in Opp. 9-10) that some courts have interpreted the APA to impose on the government the burden of showing a lack of prejudice in certain circumstances. But one of the cases she cites did not interpret the APA at all; it held that Section 706 was inapplicable. See *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1336 (10th Cir. 1982) ("We are not persuaded that the violation * * * fits within the § 706 pattern of prejudicial error."). Several of the other cases did set aside agency action under Section 706, but they did so only after identifying evidence of prejudice. See, *e.g.*, *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (noting

The interpretation of Section 706 was entrenched by the time Section 7261(b) was enacted in 1988, and Congress was well aware of it. Indeed, the Senate Committee report cited the Ninth Circuit's decision in *Seine & Line Fishermen's Union* for the proposition that, under the rule of prejudicial error, "a court should pass over errors in the record of the administrative proceedings that the court finds not to be significant to the outcome of the matter." S. Rep No. 418, *supra*, at 61. And in *Seine & Line Fishermen's Union*, the Ninth Circuit had stated that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." 374 F.2d at 981 (quoting *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943)). Thus, far from contemplating a rule of presumptive reversal like that adopted by the court below, the Committee interpreted the prejudicial-error provision to mean, in accord with the prevailing construction of Section 706, "that a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case." S. Rep. No. 418, *supra*, at 61.

The rule of prejudicial error under Section 706 applies no differently when the alleged error involves a failure to provide notice of the kind or quality legally

---

that reliance on an invalid regulation "permeates" the agency's decision and "directly informed [its] conclusion"). The remaining cases appear to have involved procedural rights—such the right to have notice and an opportunity to comment in a rulemaking—and they stand for the proposition that denial of those rights is prejudicial even if there is no evidence of an effect on the outcome of the proceeding. See, *e.g.*, *Sprint Corp.* v. *FCC*, 315 F.3d 369, 376-377 (D.C. Cir. 2003). That proposition has no application here, since there is no dispute that a VCAA notice error is prejudicial only if it has some effect on the determination of benefits.

required by the VCAA. See *American Coke & Coal Chems. Inst.* v. *EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006). Accordingly, "the party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial." *Friends of Iwo Jima*, 176 F.3d at 774. Indeed, failure to provide notice is a particularly good candidate for a finding of no prejudice, because parties may already know the information that was to be provided in the notice; the factors to which the notice was directed may have little relevance to a particular proceeding; or parties may have nothing to provide in response to the notice. See, *e.g.*, *American Airlines, Inc.*, 202 F.3d at 797 (concluding that a party's "failure to identify the evidence it would have submitted" had it received notice "indicates that [it] was not prejudiced by any inadequacy in" the notice provided by the agency); *Air Canada*, 148 F.3d at 1156-1157 (finding no prejudice where an agency made "a mid-course change in the assignment of the burden of proof" in an administrative proceeding, since petitioners' explanation of what they "would have done differently had they known at the outset of the agency proceedings that they bore the burden of proof" involved presenting evidence on issues that were not "essential to the Department's determination"). Moreover, notice defects can easily be cured, and a defective notice may be effective for its principal purpose despite a technical error. See *Intercargo Ins. Co.*, 83 F.3d at 395 (rejecting the proposition that "any extension notice that does not strictly conform to the 'form and manner' prescribed in the regulation is ineffective," because "not all deviations from the requirements of the statute or regulation would affect the interests that the statute and regulation are designed to protect").

Respondent Simmons notes (Br. in Opp. 8) that the APA, like Section 7261(b)(2), calls for courts to take "due" account of the rule of prejudicial error, and she suggests that reviewing courts should therefore have flexibility in the rule's application. But whatever the proper scope of flexibility and judgment in *applying* the rule, the statute does not give courts discretion to decide what the rule is. Congress intended for courts to apply a specific, pre-existing rule, and as explained above, that rule is one that places the burden of showing prejudice on the party challenging the agency's action.

B. The Court Of Appeals Erred In Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

The court of appeals offered several justifications for departing from the settled rule of "linguistic consistency" and traditional principles of prejudicial-error review in the context of VCAA notice errors. First, the court stated that the VCAA had "substantially overhauled the administration of the VA benefits system" and had thereby "abrogated" Congress's previously stated intent to follow the APA rule of prejudicial error. Pet. App. 20a-21a. Second, the court suggested that requiring claimants to demonstrate prejudice would be inconsistent with the "VA's uniquely pro-claimant benefits system." *Id.* at 16a. Third, the court claimed to find support for its holding in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), cases that concerned the standard of harmless-error review in criminal and habeas corpus proceedings. Pet. App. 15a. None of those rationales withstands scrutiny.

1. The enactment of the VCAA did not alter the rule of prejudicial error set out in Section 7261(b)(2)

The court of appeals justified its departure from the traditional application of the rule of prejudicial error based in part on the enactment of the VCAA, which, according to the court, "substantially overhauled the administration of the VA benefits system." Pet. App. 21a. In the court's view, "[e]ven if Congress had previously intended veterans' claim notice errors to be assessed under the same prejudicial error rule as APA notice errors, such intent was abrogated by the subsequent passage of the VCAA." *Id.* at 20a-21a. That argument rests on a misinterpretation of the VCAA.

a. As an initial matter, even if the court of appeals' interpretation of the VCAA were correct, it would not justify the court's holding. The VCAA did not purport to amend Section 7261(b)(2), and in fact it said nothing at all about the standard of review of administrative benefits determinations. As the court of appeals itself recognized in an earlier case, Section 7261(b)(2) "applies to all Veteran's Court proceedings, and nothing in the VCAA even hints that Congress intended to exempt [the notice requirement] from that general scheme." *Conway* v. *Principi*, 353 F.3d 1369, 1374 (Fed. Cir. 2004). Thus, even if the VCAA were somehow in tension with the prejudicial-error rule of Section 7261(b)(2) —which it is not—it should not be read to have impliedly amended that provision. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2533 n.8 (2007) ("[W]e have repeatedly recognized that implied amendments are no more favored than implied repeals."). Nor would it be appropriate to allow the general language of the VCAA to displace Section 7261(b)(2), the statutory provision specifically directed

at the standard of prejudicial error in the review of veterans-benefit adjudications. See *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("[S]pecific statutory language should control more general language when there is a conflict between the two.").

b. In any event, the court of appeals' interpretation of the VCAA is not correct. Nothing in the text or legislative history of the VCAA supports the court's assessment that the statute fundamentally altered the VA's claims adjudication process. To the contrary, 38 U.S.C. 5103 (2000 & Supp. V 2005) was enacted as part of a provision of the VCAA whose title made clear that it was intended to be a "[r]eaffirmation and [c]larification" of the VA's already existing "[d]uty to [a]ssist" claimants. VCAA § 3(a), 114 Stat. 2096. The House Committee on Veterans' Affairs noted that the VCAA would require the VA "to notify the claimant (and the claimant's representative) of any additional information and medical and lay evidence necessary to substantiate the claim," and it explained that "[i]t is the Committee's understanding that the Secretary *currently* undertakes to provide this notification to a claimant." H.R. Rep. No. 781, 106th Cong., 2d Sess. 9 (2000) (emphasis added). In other words, the VCAA was not intended to change the VA's practice; it was merely a "codification of [the notice] requirement" aimed at ensuring "a more uniform practice" of notifying a claimant of what evidence he or she must provide." *Ibid.*

In fact, as the court of appeals itself has recognized, the VCAA was enacted not to "overhaul" the VA's adjudication process, but simply to overturn the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477 (1999), withdrawn, 14 Vet. App. 174 (2000) (per curiam).

See *Mayfield* v. *Nicholson*, 499 F.3d 1317, 1319 (Fed. Cir. 2007) ("Congress passed the legislation in response to" the Veterans Court's decision in *Morton*.). *Morton* held that, to the extent certain VA regulations and internal procedures required the VA to assist claimants in all cases without regard to whether a claim was well grounded, they were not enforceable on judicial review. See 12 Vet. App. at 485. In the wake of *Morton*, the VA rescinded internal procedures that had instructed VA adjudicators to develop a claim fully before deciding whether it was well grounded. Congress responded by enacting the VCAA, which was intended to be restorative—that is, to return the VA to its pre-*Morton* practice of assisting veterans in the development of their claims. See H.R. Rep. No. 781, *supra*, at 8-9; S. Rep. No. 397, 106th Cong., 2d Sess. 21-22 (2000); 146 Cong. Rec. 19,229 (2000) (statement of Sen. Specter) ("[T]he Senate Committee on Veterans' Affairs has worked to craft * * * a legislative solution that returns VA to the pre-Morton status quo ante."); 146 Cong. Rec. 22,886 (2000) (statement of Rep. Stump) ("The bill addresses the Morton versus West court decision and * * * clarifies VA's duty to assist veterans with their claims.").

With respect to the notice provisions at issue in these cases, the court of appeals' own decisions reflect the similarity of the statutory requirements before and after the enactment of the VCAA. See *Mayfield* v. *Nicholson*, 444 F.3d 1328, 1335 n.3 (Fed. Cir. 2006) ("The pre-2000 version of section 5103(a) contained the core requirement, still found in the post-amendment version, that the Secretary 'shall notify the claimant of the evidence necessary to complete the application.'") (quoting 38 U.S.C. 5103(a) (1994)); *McKnight* v. *Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (discussing the VA's notice

obligations under pre-VCAA law). The history of the VCAA provides no support for the court of appeals' conclusion that the VCAA overhauled the VA claims adjudication system, much less that it altered the application of the rule of prejudicial error.

c. The court of appeals also emphasized that the VCAA's notice requirements have "a fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system," because they help to provide "a claimant a meaningful opportunity to participate effectively in the processing of his or her claim." Pet. App. 15a-16a (quoting *Mayfield* v. *Nicholson*, 19 Vet. App. 103, 120-121 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006)). That observation is correct, but it does not support the conclusion that the VCAA somehow modified the rule of prejudicial error set out in Section 7261(b)(2). Whenever Congress enacts a statute imposing obligations on an agency, it presumably intends to benefit someone or to protect an interest that it deems important. That is not a basis for concluding that, should the agency fail to fulfill those obligations, ordinary principles of prejudicial error are inapplicable.

Moreover, the court of appeals failed to appreciate that Section 7261(b)(2) was itself part of a statute—the Veterans' Judicial Review Act—that codified VA regulations prescribing adjudication procedures beneficial to claimants. Among other things, that statute required the VA to assist claimants in developing evidence and to "give[]" "the benefit of the doubt to the claimant" in cases of "an approximate balance of positive and negative evidence" on any issue material to the claim. Pub. L. No. 100-687, Div. A, § 103, 102 Stat. 4107 (38 U.S.C. 5107(b)). It also required the Board of Veterans' Ap-

peals to provide claimants an opportunity for a hearing before deciding a claim and to provide a statement of the reasons for its decision on all material issues of fact and law. *Id.* §§ 203(a), 205, 102 Stat. 4110, 4111 (38 U.S.C. 7014(a) and (d)); see S. Rep. No. 418, *supra*, at 22-24. Those provisions were intended to affirm the VA's "practice of making every effort to award a benefit to a claimant" and its "obligation * * * to provide complete assistance to the veteran or other claimant in the development of a claim." *Id.* at 32-33. They protect rights just as significant and "fundamental" as those in the VCAA, and their inclusion in the same statute as Section 7261(b)(2) provides strong evidence that Congress did not see any inconsistency between requiring the VA to assist veterans and applying the traditional rule of prejudicial error on judicial review of the agency's decisions.

d. Respondent Simmons suggests (Br. in Opp. 15) that the court of appeals' interpretation is supported by the canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991). The court of appeals did not rely on that argument, and with good reason. To begin with, the canon is applicable only when a statute is ambiguous. Cf. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). "Ambiguity is a creature not of definitional possibilities but of statutory context," *ibid.*, and particularly in light of the well-settled meaning of the language in the APA that Congress borrowed for Section 7261(b)(2), that provision is not ambiguous. Moreover, Section 7261(b)(2) is not a substantive "provision[] for benefits"; it is a procedural statute governing the scope of judicial review. The canon does not apply to such a procedural rule, even when there is statutory ambiguity.

2. *The nonadversarial nature of VA administrative proceedings provides no basis for an exception to the generally applicable rule of prejudicial error*

The court of appeals stated that the application of the traditional rule of prejudicial error would contravene "Congress's clear desire to create a framework conducive to efficient claim adjudication" and would "create[] a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process" to obtain a "fair adjudication." Pet. App. 16a. The court further suggested that such a result would be incompatible with "VA's uniquely pro-claimant benefits system." *Ibid.* That line of reasoning rests on a confusion between the VA's administrative claims-adjudication process and judicial review of the VA's decisions.

As this Court has observed, the VA's administrative claims-adjudication process is nonadversarial and is "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). Judicial review in the Veterans Court, however, is quite different: it follows the traditional adversarial model of appellate litigation. See *Forshey* v. *Principi*, 284 F.3d 1335, 1355 (Fed. Cir.) (en banc), cert. denied, 537 U.S. 823 (2002). The act of filing an appeal to the Veterans Court "is the first step in an adversarial process challenging the Secretary's decision on benefits," separate and distinct from the VA administrative process. *Bobbitt* v. *Principi*, 17 Vet. App. 547, 552 (2004) (per curiam). Before the Veterans Court, the Secretary of Veterans Affairs is a represented appellee in an appellate court, and claimants likewise are typically represented by counsel. *Ibid.* In Fiscal Year 2007,

about 47% of appellants were represented at the time they filed their appeal to the Veterans Court, and over 80% were represented by the time the case was decided.[5] Thus, even if it were correct that requiring claimants to show prejudice would "require[] a claimant asserting a notice error to seek counsel" to pursue an appeal, Pet. App. 16a, that would not be a basis for an exception to the rule of prejudicial error. In any event, the legal and factual issues relevant to a showing of prejudice are no more complex than any other issues that might be involved in a claimant's appeal to the Veterans Court, so there is no reason why the rule that a claimant must show prejudice should require the retention of counsel if other issues in the case did not.

Moreover, as this Court has noted, "there are wide differences between administrative agencies and courts." *Sims* v. *Apfel*, 530 U.S. 103, 110 (2000) (quoting *Shepard* v. *NLRB*, 459 U.S. 344, 351 (1983)). The rule of prejudicial error is a limit on the exercise of *judicial* authority, and the fact that the challenged decision was reached through a nonadversarial administrative proceeding does not alter the operation of the rule that a party seeking to invoke the remedial powers of a federal court must demonstrate prejudicial error. For example, even though Social Security disability hearings are nonadversarial, courts require a showing of prejudice before remanding based on errors in such proceedings. See, *e.g.*, *Nelson* v. *Apfel*, 131 F.3d 1228, 1236 (7th Cir. 1997); *Shannon* v. *Chater*, 54 F.3d 484, 488 (8th Cir. 1995). There is no reason to apply a different rule here.

[5] See U.S. Court of Appeals for Veterans Claims, *Annual Reports* <http://www.vetapp.gov/documents/Annual_Reports_2007.pdf>

3. *The court of appeals erred in relying on the treatment of harmless error in criminal and habeas corpus proceedings*

The court of appeals also claimed to find support for its interpretation of Section 7261(b)(2) in *Kotteakos* v. *United States*, *supra*, and *O'Neal* v. *McAninch*, *supra*. Pet. App. 15a. Its reliance on those cases was fundamentally misplaced.

a. In *Kotteakos*, this Court reviewed a federal criminal conviction for conspiracy, and it held that the district court had erred in permitting a large number of defendants to be tried together for one conspiracy when the evidence established that there were actually several separate conspiracies. 328 U.S. at 755-756. Applying the harmless-error rule of 28 U.S.C. 391 (1940)—now codified, as amended, at 28 U.S.C. 2111—the Court determined that the error was not harmless. See *Kotteakos*, 328 U.S. at 772-777. In reaching that conclusion, the Court stated that, while an appellant normally has "the burden of showing that any technical errors that he may complain of have affected his substantial rights," when the error "is of such character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will * * * rest upon the one who claims under it." *Id.* at 760 (quoting H.R. Rep. No. 913, 65th Cong., 3d Sess. 1 (1919)).

In *O'Neal*, this Court held that in a habeas corpus proceeding, when a court is in "grave doubt" about the likely effect of a constitutional error on the jury's guilty verdict, it should conclude that the error was not harmless. 513 U.S. at 435-436. In so holding, the Court rejected the argument that the appellant's burden of showing prejudice in an ordinary civil action applies to habeas proceedings. *Id.* at 440. The Court acknowl-

edged the statement in *Palmer*, that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted," 318 U.S. at 116, but it explained that that language referred to technical errors and thus did not encompass errors that have the "natural effect" of prejudicing substantial rights. *O'Neal*, 513 U.S. at 439-440 (quoting H.R. Rep. No. 913, *supra*, at 1).

b. *Kotteakos* and *O'Neal* are inapplicable here because they involved an individual's loss of liberty, not an administrative adjudication of an entitlement to monetary benefits. Cf. *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits * * * have a legitimate claim of entitlement protected by the Due Process Clause."); *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59-61 (1999). The nature of the proceeding in *Kotteakos*—a criminal prosecution—was crucial to the Court's decision in that case. As the Court explained, although Section 391 was applicable to both civil and criminal cases, the statute "grew out of widespread and deep conviction over the general course of appellate review in American criminal causes." 328 U.S. at 759. And the Court observed that the statute "did not make irrelevant the fact that a person is on trial for his life or his liberty. It did not require the same judgment in such a case as in one involving only some question of civil liability." *Id.* at 763. In fact, just six months after *Kotteakos*, this Court described its decision in that case as involving a review of "the history of [Section 391] and the function it was designed to serve in *criminal* cases." *Fiswick* v. *United States*, 329 U.S. 211, 217-218 (1946) (emphasis added).

Likewise, the Court in *O'Neal* emphasized "the stakes involved" in the proceeding. 513 U.S. at 440.

Specifically, it observed that "the errors being considered by a habeas court occurred in a *criminal* proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake." *Ibid.* In addition, the Court noted, the error involved was "of constitutional dimension"—another consideration that is not present here. *Id.* at 442.

c. The court of appeals attempted to justify its reliance on *Kotteakos* and *O'Neal* by quoting *O'Neal*'s statement that "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." Pet. App. 15a (quoting *O'Neal*, 513 U.S. at 441). But the Court in *O'Neal* made that observation in the context of 28 U.S.C. 2111, as well as former Section 391, which, "by its terms, applied to both civil and criminal cases." 513 U.S. at 441. The Court also noted that "the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to § 391 as their statutory source." *Ibid.*

Those federal rules and statutory provisions govern appellate review of a lower court's decision, but they are not applicable to judicial review of administrative proceedings. See *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) ("[T]o assimilate the relation of * * * administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process."). These cases arise in that quite different context, and involve a different statute that uses different lan-

guage. Compare 38 U.S.C. 7261(b)(2) (Supp. V 2005) (The Veterans Court shall "take due account of the rule of prejudicial error."), with 28 U.S.C. 2111 ("[T]he court shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties."). And unlike Section 2111, the statute at issue here has no application to criminal proceedings.

d. Moreover, *O'Neal* considered the appropriate resolution of civil appeals only in cases where there is "grave doubt as to the harmlessness of errors"—that is, cases in which, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise." 513 U.S. at 435, 441. Unlike the error at issue in *O'Neal*—an erroneous jury instruction, see *id.* at 436—the error here could lead to prejudice only by causing the claimant to fail to present evidence that he or she might otherwise have presented. Whatever the proper resolution of a case in which some other claim of prejudicial error is presented or the arguments for and against prejudice are ultimately in "equipoise," it is appropriate to assign to the claimant the burden of showing that he or she had material evidence to present and suffered prejudice because it was not presented.

Even after *O'Neal*, courts of appeals have held that in "ordinary civil cases," the party asserting error has the burden of making a showing of prejudice under 28 U.S.C. 2111 and Federal Rule of Civil Procedure 61. *Morrison Knudsen Corp.* v. *Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999). Thus, if "the parties' failure to provide" "an adequate record and arguments" leaves the court unable to review whether there was prejudice, then "the risk of doubt must rest with the appellant." *Id.* at 1241; see *Tesser* v. *Board of Educ. of the City Sch. Dist.*, 370 F.3d 314, 319-320 (2d Cir. 2004);

Dresser-Rand Co. v. *Virtual Automation Inc.*, 361 F.3d 831, 841-842 (5th Cir. 2004); *In re Watts*, 354 F.3d 1362, 1369 (Fed. Cir. 2004); *Rogers* v. *City of Chi.*, 320 F.3d 748, 751 (7th Cir. 2003); *Cigna Ins. Co.* v. *Oy Saunatec, Ltd.*, 241 F.3d 1, 8 (1st Cir. 2001); *Qualley* v. *Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1127-1128 (8th Cir. 2000); *Piamba Cortes* v. *American Airlines, Inc.*, 177 F.3d 1272, 1305-1306 (11th Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1214-1215 (D.C. Cir. 1997); but see *Obrey* v. *Johnson*, 400 F.3d 691, 699-702 (9th Cir. 2005). Those were ordinary civil cases that did not involve judicial review of agency action. *A fortiori*, there is no basis for applying a presumption of prejudice in cases such as these, which involve judicial review of an administrative decision—a subject governed by different standards and principles of judicial review.

C. A Presumption Of Prejudice From VCAA Notice Errors Is Unwarranted

Even if Section 7261(b)(2) gave the Veterans Court discretion to decide whether to impose a presumption of prejudice, such a presumption would be inappropriate. Unlike the errors addressed in *Kotteakos* and *O'Neal*, a failure to provide the notice required by Section 5103(a) is not one whose "natural effect is to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760 (quoting H.R. Rep. No. 913, *supra*, at 1). To the contrary, there are several reasons why a notice error may result in no prejudice to a VA claimant. The claimant may already be aware, through means other than a VCAA notice, of the types of evidence needed to substantiate his or her claim. Or the claimant may simply have no additional relevant evidence to submit. More

importantly, in contrast to *Kotteakos*, in which review by the court of appeals provided the first opportunity to correct a trial-court error, the informal and non-adversarial process for adjudicating claims for veterans benefits provides many procedural safeguards that have the potential to cure any defect in the initial Section 5103(a) notice. See *Thurber* v. *Brown*, 5 Vet. App. 119, 123 (1993) (The nonadversarial system "is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process."). As a result, it is unlikely that a notice error will truly cause prejudice to a claimant—and there is certainly no basis to conclude that it *invariably* will cause such prejudice. A rule of presumptive prejudice, however, would be difficult for the VA to overcome—even in cases where there is no prejudice—and would therefore lead to unnecessary remands that would delay the resolution of meritorious claims.

1. VCAA notice errors do not have the natural effect of producing prejudice

Under Section 5103(a), the VA is required to notify a claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. 5103(a). The notice must also "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary * * * will attempt to obtain." *Ibid.* Although that notice is an important step in the claims-adjudication process, it is the just the beginning of a dialogue between the claimant and the VA that continues throughout the development, adjudication, and appeal of the claim. That multi-step process provides multiple opportunities

for a claimant to obtain necessary evidence and learn of any deficiencies in his or her case.

After the VA provides a claimant with the Section 5103(a) notice, it must make reasonable efforts to obtain public and private records relevant to the claim. 38 U.S.C. 5103A(b) and (c). In a claim for disability compensation, such as those filed by respondents, the VA's assistance must include obtaining the veteran's service medical records, records of relevant VA treatment or examination, and "[a]ny other relevant records held by any Federal department or agency," "unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile." 38 U.S.C. 5103A(b)(3) and (c)(3). The VA must also provide a medical examination or obtain a medical opinion when appropriate. 38 U.S.C. 5103A(d). For example, after the Board found that Sanders had presented evidence to reopen his previously denied claim, the VA provided him with two ophthalmological examinations. Pet. App. 41a, 48a-49a. Similarly, after Simmons filed her initial claim for an increased disability rating, the VA provided her with several audiological examinations in order to evaluate the extent of her service-connected hearing loss. *Id.* at 69a, 88a-91a. In addition, the VA obtained "all identified records from postservice medical care providers," including records of treatment by private medical providers. *Id.* at 86a.

By regulation, all claimants for veterans benefits are entitled to a hearing "at any time on any issue involved in a claim," for the purpose of presenting evidence. 38 C.F.R. 3.103(c)(1) and (2). At such hearings, "[i]t is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have

overlooked and which would be of advantage to the claimant's position." 38 C.F.R. 3.103(c)(2).

If a VA regional office denies a claim, it must give a statement of the reasons for its decision and a summary of the evidence that it considered. 38 U.S.C. 5104(b); 38 C.F.R. 3.103(b)(1). That statement will inform the claimant if benefits were denied because the evidence was insufficient. And the VA's duty to develop the claim continues even after a decision on the claim is issued. If a claimant initiates the VA appellate process by filing a notice of disagreement with the regional-office decision, the VA must take "such development or review action as it deems proper." 38 U.S.C. 7105(d)(1). The claimant also has the right at that stage to have his or her case reviewed by a decision review officer, who is authorized to conduct whatever development of the claim is necessary, including attempting to obtain additional evidence, holding an informal conference with the claimant, or conducting a hearing. 38 C.F.R. 3.2600(c) and (d).

If the disagreement is not resolved, the VA must issue a statement of the case summarizing the reasons for its decision on each issue, the evidence considered, and the relevant statutes and regulations. 38 U.S.C. 7105(d)(1). A claimant may submit additional information or evidence to the VA after a statement of the case has been provided; if the disagreement is still not resolved, the VA will provide the claimant with a supplemental statement of the case. 38 C.F.R. 19.31(a) and 20.302(c). Those statements identify the areas in which the claim was found deficient and thus provide notice of the type of evidence still needed in order to substantiate the claim. For example, one of the supplemental statements of the case provided to Sanders listed the evidence that the regional office had considered, see J.A. 12

and it advised him to "please notify us" of any "other medical evidence you would like us to consider" so that "we [can] make a reasonable effort to obtain it," J.A. 21. See J.A. 32 (supplemental statement of the case listing evidence considered in Simmons's case); *id.* at 30 (informing Simmons that "we are giving you a period of 60 days to make any comment you wish concerning the additional information" identified in the supplemental statement).

The VA's duty to assist—and a claimant's opportunity to present evidence and argument—continues during the VA appellate process. The Board has the power to consider newly submitted evidence if the claimant waives consideration in the first instance by the regional office. 38 C.F.R. 20.1304(c); see *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 327 F.3d 1339, 1346-1348 (Fed. Cir. 2003). In addition, a claimant is entitled to a hearing to allow the Board "to receive argument and testimony relevant and material to the appellate issue." 38 C.F.R. 20.700(b); 38 U.S.C. 7107(b). The Board may also obtain an expert medical opinion if appropriate. 38 U.S.C. 7109(a). Finally, the Board may remand the case to the regional office if further evidence or clarification of the evidence is necessary to decide the appeal. 38 C.F.R. 19.9.

In sum, between the VA's initial notice under Section 5103(a) and the time an appeal is brought before the Veterans Court, the VA will likely have taken numerous steps designed to assist claimants in obtaining necessary evidence and to inform them of any deficiencies in the evidence in a case. There is therefore no basis for a conclusion that any VA error in providing notice under Section 5103(a) at the outset of that multi-stage and protec-

tive process will have the "natural effect" of producing prejudice.

2. A benefits claimant is in a better position than the VA to establish whether a VCAA notice error has caused prejudice

Under the decisions of the court of appeals, the VA would be able to prevail in a case of VCAA notice error only by rebutting the presumption that the claimant was prejudiced. Pet. App. 19a. It is likely that the VA would be unable to meet that burden in many cases—even those in which there was not, in fact, any prejudice as a result of the error. For example, the court of appeals noted that the VA could overcome the presumption of prejudice by showing that "any defect was cured by actual knowledge on the part of the claimant." *Id.* at 14a-15a. But while the claimant is presumably aware of whether he or she had actual knowledge, the VA is unlikely to have any evidence bearing on that issue. Similarly, it might be true that "a benefit could not possibly have been awarded" in a particular case, *id.* at 63a, because there is no evidence supporting the claim. But the VA might have no way of affirmatively demonstrating the absence of any further evidence that would support the claim. See *Elkins* v. *United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative."). By contrast, if there actually *is* evidence concerning the claimant's medical condition that is not already in the record and would demonstrate that benefits could be awarded, the claimant is far more likely to be the one with access to that information.

In these cases, for example, Sanders allegedly failed to receive notice of "who would ultimately be responsible for obtaining evidence necessary to substantiate [his]

claim," Pet. App. 38a, while Simmons allegedly failed to receive notice "of the evidentiary prerequisites for establishing" her claim, *id.* at 78a. Those errors might have prejudiced respondents by making it more difficult for them to provide appropriate evidentiary support for their claims. The only way to determine whether there was prejudice, however, is to conduct an inquiry into whether, in the absence of the notice error, respondents would have been able to submit additional evidence. The record before the Veterans Court includes the VA's entire file, and respondents are in a far better position than the VA to know what additional evidence they might have submitted about their own medical condition. A presumption of prejudice is therefore inconsistent with the general principle that burdens are appropriately placed on the party who is more likely to have knowledge of the relevant facts. See *United States* v. *Fior d'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002).

Because of the difficulty of overcoming a presumption of prejudice, such a presumption would generate a large number of remands, in each of which the VA would be required to send the case back to the regional office, provide an additional notice to the appellant, await a response from the appellant, and then readjudicate the remanded claim. To make matters worse, the VA has a statutory obligation to provide expedited treatment to remanded claims. See 38 U.S.C. 5109B, 7112 (Supp. V 2005). Many of those remands would be pointless because, for reasons known to the claimant but not the VA, the notice error would have made no difference to the outcome of the proceeding. Such remands would divert resources from the adjudication of meritorious claims. The VA receives more than 800,000 benefits applications

every year,[6] and the additional remands would place further strain on the VA's already burdened claims-administration process, delaying awards of benefits on meritorious claims. By contrast, placing on the claimant the burden of showing prejudice would better serve the purposes of Section 7261(b)(2) because it would limit remands to cases in which the agency's error actually affected the outcome of the proceeding.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

GREGORY G. KATSAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

JEANNE E. DAVIDSON
TODD M. HUGHES
MARTIN F. HOCKEY, JR.
Attorneys

PAUL J. HUTTER
General Counsel

RICHARD J. HIPOLIT
Assistant General Counsel

DAVID J. BARRANS
MARTIE S. ADELMAN
Attorneys
Department of Veterans Affairs

AUGUST 2008

---

[6] See *Examining the U.S. Department of Veterans Affairs' Claims Processing System: Hearing Before the Subcomm. on Disability Assistance and Mem'l Affairs of the House Comm. on Veterans' Affairs*, 110th Cong., 2d Sess. (2008) <http://veterans.house.gov/hearings/Testimony_Print.aspx?newsid=189&Name=_Michael_Walcoff> (statement of Deputy Under Secretary Michael Walcoff, Dep't of Veterans Affairs, Veterans Benefits Admin.).

APPENDIX

1. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 38 U.S.C. 5103 (2000 & Supp. V 2005) provides in pertinent part:

Notice to claimants of required information and evidence

(a) REQUIRED INFORMATION AND EVIDENCE.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

* * * * *

3. 38 U.S.C. 7261 (2000 & Supp. V 2005) provides in pertinent part:

Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

* * * * *

RESPONDENT'S BRIEF

No. 07-1209

Supreme Court, U.S.
FILED
OCT 14 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS,
Petitioner,

v.

WOODROW F. SANDERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT PATRICIA SIMMONS

SEAN A. RAVIN
2800 Quebec St. NW
Washington, DC 20008
(202) 607-5731

CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
MEGAN BARBERO
MATTHEW T. JONES
CATHERINE M. RAHM
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

QUESTION PRESENTED

Whether the court of appeals erred in holding that when the Department of Veterans Affairs (VA) fails to provide statutorily required notice to benefits claimants, the VA should bear the burden of showing that such an error was not prejudicial.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

A. Statutory Background 2

B. Factual and Procedural History 6

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. STATUTORY STRUCTURE AND PURPOSE MAKE CLEAR THAT THE BURDEN SHOULD BE ALLOCATED TO THE VA 11

A. The VJRA's Prejudicial Error Rule Is Part Of A Benefits Scheme That Consistently Imposes Obligations On The VA 13

B. The Central Role Of VCAA Notice In The Statutory Structure Governing Benefits Claims Demonstrates That The Burden Must Rest On The VA, Not The Veteran 18

C. The Likelihood Of Prejudice From Notice Errors And The VA's Superior Ability To Meet Its Burden Support Allocating The Burden To The VA 23

TABLE OF CONTENTS—Continued

Page

D. The Government's Policy Arguments Do Not Override The Statutory Structure And Purpose 31

II. THE GOVERNMENT IS INCORRECT THAT THE APA REQUIRES THE VETERAN TO BEAR THE BURDEN OF PROVING PREJUDICE UNDER THE VJRA 34

A. The VJRA Did Not Ratify A Uniform Interpretation Of The APA In 1988 Because There Was No Such Uniform Interpretation 35

B. The Government's Argument That The VJRA Prejudicial Error Rule Should Be Interpreted Identically To The APA Rule Relies On Two Faulty Assumptions 38

1. In light of the differences in the statutory schemes, the interpretation of the VJRA and APA prejudicial error rules need not be the same 39

2. The Government incorrectly assumes the meaning of the APA provision 41

CONCLUSION 48

TABLE OF AUTHORITIES

CASES

Page(s)

Air Canada v. *Department of Transportation*, 148 F.3d 1142 (D.C. Cir. 1998) 45

Alaska Department of Environmental Conservation v. *EPA*, 540 U.S. 461 (2004) 11, 12

American Airlines, Inc. v. *Department of Transportation*, 202 F.3d 788 (5th Cir. 2000) 46

Bailey v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) 4, 20

Bar MK Ranches v. *Yuetter*, 994 F.2d 735 (10th Cir. 1993) 46

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988) 12

Beef Nebraska, Inc. v. *United States*, 807 F.2d 712 (8th Cir. 1986) 37, 46

Boone v. *Lightner*, 319 U.S. 561 (1943) 34

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 37

Braniff Airways, Inc. v. *CAB*, 379 F.2d 453 (D.C. Cir. 1967) 36

Brown v. *Gardner*, 513 U.S. 115 (1994) 33

Bryan v. *Itasca County*, 426 U.S. 373 (1976) 33

Campanale & Sons, Inc. v. *Evans*, 311 F.3d 109 (1st Cir. 2002) 45, 46, 47

City of Camden v. *Department of Labor*, 831 F.2d 449 (3rd Cir. 1987) 37, 46

City of Frankfort v. *FERC*, 678 F.2d 699 (7th Cir. 1982) 36, 46

TABLE OF AUTHORITIES—Continued

Page(s)

City of Sausalito v. *O'Neill*, 386 F.3d 1186 (9th Cir. 2004) 47

Clark v. *Peake*, No. 05-2422, 2008 WL 852588 (Vet. App. Mar. 24, 2008) 28

Cordova v. *Peake*, No. 06-0309, 2008 WL 834006 (Vet. App. Mar. 24, 2008) 29

Dickinson v. *Zurko*, 527 U.S. 150 (1999) 41

Disabled American Veterans v. *Secretary of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005) 4

District of Columbia v. *Carter*, 409 U.S. 418 (1973) 40

Dixon v. *United States*, 548 U.S. 1 (2006) 37

Friends of Iwo Jima v. *National Capital Planning Commission*, 176 F.3d 768 (4th Cir. 1999) 46

General Dynamics Land Systems, Inc. v. *Cline*, 540 U.S. 581 (2004) 40

Gifford Pinchot Task Force v. *U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) 47

Grivois v. *Brown*, 6 Vet. App. 136 (1994) 16

Holmes v. *Peake*, No. 06-0852, 2008 WL 974728 (Vet. App. Apr. 3, 2008) 28

Hunt v. *Nicholson*, No. 05-2812, 2007 WL 1659062 (Vet. App. May 11, 2007) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Intercargo Insurance Co. v. *United States*, 83 F.3d 391 (Fed. Cir. 1996) 46

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 12, 23

Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982) 33, 36

Kent v. *Nicholson*, 20 Vet. App. 1 (2006) 19

Keyes v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973) 12

King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991) 33

Kotteakos v. *United States*, 328 U.S. 750 (1946) 43, 44, 45

Kroger Co. v. *Regional Airport Authority*, 286 F.3d 382 (6th Cir. 2002) 46

Market Street Railway Co. v. *Railroad Commission of State of California*, 324 U.S. 548 (1945) 44

Mayfield v. *Nicholson*, 19 Vet. App. 103 (2005) 3, 5, 6, 21, 25

Mayfield v. *Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006) 3, 19, 21, 27

McGee v. *Peake*, 511 F.3d 1352 (Fed. Cir. 2008) 34

McKnight v. *Gober*, 131 F.3d 1483 (Fed. Cir. 1997) 18, 34

McLouth Steel Products Corp. v. *Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) 35, 36

TABLE OF AUTHORITIES—Continued

Page(s)

Meacham v. *Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008) 11

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 (1982) 37

Moore v. *Nicholson*, 21 Vet. App. 211 (2007) 24

Morton v. *West*, 12 Vet. App. 477 (1999) 16

National Association of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 41

National Organization of Veterans' Advocates, Inc. v. *Secretary of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001) 33

NLRB v. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) 27

NLRB v. *Seine & Line Fishermen's Union*, 374 F.2d 974 (9th Cir. 1967) 37, 38, 45

Nolen v. *Gober*, 222 F.3d 1356 (Fed. Cir. 2000) 14

O'Neal v. *McAninch*, 513 U.S. 432 (1995) 43, 45

Overton v. *Nicholson*, 20 Vet. App. 427 (2006) 29

Palmer v. *Hoffman*, 318 U.S. 109 (1943) 37, 43

Paralyzed Veterans of America v. *Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003) 21

Quartuccio v. *Principi*, 16 Vet. App. 183 (2002) 17

Sanders v. *Nicholson*, 487 F.3d 881 (Fed. Cir. 2007) 8

Schaffer v. *Weast*, 546 U.S. 49 (2005) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Sierra Club v. *U.S. Fish & Wildlife Service*, 245 F.3d 434 (5th Cir. 2001) 47

Simmons v. *United States*, 348 U.S. 397 (1955) 44

Sprint Corp. v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003) 47

Sugar Cane Growers Cooperative of Florida v. *Veneman*, 289 F.3d 89 (D.C. Cir. 2002) 32, 47

Thomas v. *Arn*, 474 U.S. 140 (1985) 38

U.S. Steel Corp. v. *EPA*, 595 F.2d 207 (5th Cir. 1979) 36

United States v. *First City National Bank of Houston*, 386 U.S. 361 (1967) 12

Valiao v. *Principi*, 17 Vet. App. 229 (2003) 28

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 42

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 14

STATUTES AND REGULATIONS

5 U.S.C.
§ 701 39
§ 706 41

28 U.S.C.
§ 391 ..... 42, 43
§ 1254 1

TABLE OF AUTHORITIES—Continued

Page(s)

38 U.S.C.
- § 211 (1988) 39
- § 501 40
- § 1110 2
- § 1111 4
- § 1112 4
- § 1131 2
- § 5101 3
- § 5102 3
- § 5103 ..... 2, 3, 15, 18, 21, 29
- § 5103 (1999) 18
- § 5103A 4, 15, 20, 29
- § 5104 26
- § 5107 ..... 4, 5, 15, 16, 22
- § 5904 21
- § 7104 4
- § 7105 26
- § 7252 ..... 5, 15
- § 7261 ..... 2, 5, 13, 15, 16, 22
- § 7292 ..... 5, 8

40 Stat. 1181 42

38 C.F.R.
- § 3.103 26
- § 3.310 7

LEGISLATIVE MATERIALS

H.R. Rep. No. 65-913 (1919) 42, 43, 44

H.R. Rep. No. 100-963 (1988) 14

H.R. Rep. No. 105-52 (1997) 3, 15

H.R. Rep. No. 106-781 (2000) 17

TABLE OF AUTHORITIES—Continued

Page(s)

S. Rep. No. 100-418 (1988) 34, 38, 40, 45

S. Rep. No. 106-397 (2000) 19

146 Cong. Rec. H6786 (daily ed. May 11, 2000) 14, 30

146 Cong. Rec. S9211 (daily ed. Sept. 25, 2000) 14, 17

146 Cong. Rec. H9912 (daily ed. Oct. 17, 2000) 17

OTHER AUTHORITIES

Administrative Procedure Act Legislative History, Sen. Doc. No. 79-248 (1946) 42

Alvarez, Lizette, *War Veterans' Concussions Are Often Overlooked*, N.Y. Times, Aug. 25, 2008, *available at* http://www.nytimes.com/2008/08/26/us/26tbi.html?_r=2&hp&oref=slogin&oref=slogin 30

Attorney General's Manual on the Administrative Procedure Act (1947) 42

Berger, Raoul, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137 (1967) 13

Cohen, Patricia, *Talking Veterans Down from Despair*, N.Y. Times, Apr. 22, 2008, *available at* http://www.nytimes.com/2008/04/22/uu/22suicide.html?scp=10&sq=veterans&st=cse 30

Federal Laws Relating to Veterans of Wars of the United States (Annotated) (GPO 1932) 14

2 *McCormick On Evidence* § 337 (6th ed. 2006) 12

TABLE OF AUTHORITIES—Continued

Page(s)

2B Singer, Norman J. & Singer, J.D. Shambie, *Statutes and Statutory Construction* § 49:4 (7th ed. 2008) 35

United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited Oct. 14, 2008) 30, 31

VA General Counsel Memorandum 8-2003 (Dec. 22, 2003) 19

9 Wigmore, *Evidence* § 2486 (Chadbourne rev. ed. 1981) 12

21B Wright & Graham, *Federal Practice & Procedure* § 5122 (2005) 23, 24, 27

IN THE

Supreme Court of the United States

No. 07-1209

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS,
Petitioner,

v.

WOODROW F. SANDERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENT PATRICIA SIMMONS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-64a) is reported at 487 F.3d 892. The order denying the petition for rehearing and rehearing en banc (Pet. App. at 65a-66a) is unreported. The decision of the United States Court of Appeals for Veterans Claims (*id.* at 67a-82a) is unreported. The decision of the Board of Veterans' Appeals (*id.* at 83a-96a) is unreported.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Veterans Claims Assistance Act of 2000 provides in relevant part:

> **Notice to claimants of required information and evidence**
>
> (a) Required information and evidence.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

2. The Veterans' Judicial Review Act provides that the United States Court of Appeals for Veterans Claims shall "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2).

STATEMENT

A. Statutory Background

1. Veterans who suffer a physical or mental disability resulting from their active military service are generally entitled to disability benefits. *See* 38 U.S.C. §§ 1110, 1131. Such benefits are available to veterans who served during war and peace, and to those who served on the battlefield and off. *See id.* §§ 1110, 1131.

In order to apply for disability compensation, a veteran must file a claim for that benefit with the Department of Veterans Affairs (VA). *See id.* § 5101(a).

The VA claims system is structured to be "unlike any other adjudicative process," in that "[i]t is specifically designed to be claimant friendly." H.R. Rep. No. 105-52, at 2 (1997). Congress has implemented a comprehensive pro-claimant scheme by, among other things, requiring the VA to assist the veteran in proving his claim. Detailed statutory notice requirements enacted in the Veterans Claims Assistance Act of 2000 (VCAA) are one of the first steps in the process and are a central part of this assistance-based framework. The "core requirement," *Mayfield* v. *Nicholson*, 444 F.3d 1328, 1335 n.3 (Fed. Cir. 2006), of these notice provisions is that "[u]pon receipt of a complete or substantially complete application," the Secretary is required to notify the claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. § 5103(a). This notice requirement has been called the "first-element" notice. *See Mayfield* v. *Nicholson*, 19 Vet. App. 103, 123 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

The VCAA also requires other forms of notice: the Secretary must inform the claimant of which portion of the necessary information should be provided by the claimant, and which portion the Secretary will attempt to obtain on the claimant's behalf. 38 U.S.C. § 5103(a). These forms of notice are termed, respectively, second- and third-element notice. *See Mayfield*, 19 Vet. App. at 122; *see also* Pet. App. 9a. If an application for benefits is incomplete, the Secretary must also notify the claimant of the information necessary to complete the application. *See* 38 U.S.C. § 5102(b).

Congress has imposed a variety of additional obligations on the VA aimed at assisting the veteran in substantiating his claim. For instance, the VA is required to assist claimants by making "reasonable efforts" to obtain evidence to substantiate the veteran's claim, *see* 38 U.S.C. § 5103A(a)(1), such as by obtaining relevant records on behalf of the claimant. *Id.* § 5103A(b)(1); *see also id.* § 5103A(c). The statute also sets up various presumptions to favor veterans, making it easier for them to obtain benefits. *See, e.g., id.* §§ 1111 (presumption of sound condition), 1112 (listing service-connection presumptions). And the statute breaks a tie "regarding any issue material to the determination of a matter" in favor of the veteran: the VA must "give the benefit of the doubt" to the veteran whenever "there is an approximate balance of positive and negative evidence." *Id.* § 5107(b).

A veteran's claim for benefits is initially adjudicated by one of the VA's regional offices. *See Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 419 F.3d 1317, 1318 (Fed. Cir. 2005). If a veteran's claim for benefits is denied by the regional office, he may appeal the decision within the agency to the Board of Veterans' Appeals (Board). *See* 38 U.S.C. § 7104(a).

2. Congress also created a special system for the review of the agency's benefits decisions. Review of such decisions is not governed by the Administrative Procedure Act (APA); rather, Congress vested jurisdiction over these appeals in the United States Court of Appeals for Veterans Claims (Veterans Court), "an Article I court set in a sui generis adjudicative scheme for awarding benefit entitlements to a special class of citizens." *Bailey* v. *West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring). Only the veteran, and not the VA, may seek review in the Veterans

Court. 38 U.S.C. § 7252(a). Factual findings of the Board that are favorable to the veteran are not subject to review. *See id.* § 7261(a)(4). On review, the court must "take due account" of the fact that the VA was required to give the "benefit of the doubt" to the veteran, breaking ties in the veteran's favor. *Id.* § 7261(b)(1); *see also id.* § 5107(b). The Veterans Court is also required to "take due account of the rule of prejudicial error," *id.* § 7261(b)(2), though the statute does not specify whether the VA or the veteran has the burden to prove or disprove prejudice when the agency errs.

Decisions of the Veterans Court can be appealed to the Federal Circuit, which has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" by the Veterans Court. 38 U.S.C. § 7292(c). The Federal Circuit generally does not have jurisdiction to review factual findings. *See id.* § 7292(d)(2).

3. In 2005, the Veterans Court addressed the Veterans' Judicial Review Act (VJRA) prejudicial error provision, Section 7261(b)(2), in the context of the notice requirements of the VCAA. *Mayfield*, 19 Vet. App. 103. The court held that when the VA commits a first-element notice error by failing to notify the claimant of the information and evidence necessary to substantiate the claim, the VA bears the burden of demonstrating that there was no prejudice to the claimant from that error, given that such an error has "the natural effect of producing prejudice." *Id.* at 122. The *Mayfield* court explained that the first-element notice error alleged in that case "would constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the claimant] from participating effectively in the processing of [the] claim, which

would substantially defeat the very purpose of section 5103(a) notice." *Id.* The court held that when the VA fails to comply with the additional statutory notice requirements, however, the claimant has the burden of showing that those errors prejudiced the proceeding by affecting its essential fairness. *Id.* at 122-123.

B. Factual And Procedural History

1. Respondent Patricia Simmons[1] served on active duty in the United States Navy from 1978 to 1980. Pet. App. 68a. While in the Navy, Simmons worked on a flight line near aircraft engines, which meant that she was constantly subject to a noisy work environment. *Id.* at 68a, 88a, 90a.

In 1980, Simmons filed with a VA regional office an application for disability benefits for hearing loss in her left ear. Pet. App. 68a. The regional office concluded that she had a current disability, and that the disability was "service connected" because the increase in her hearing loss was caused by her military service. *Id.* at 68a, 86a. The regional office, however, denied her claim for benefits on the basis that the disability was not severe enough to be compensable. *Id.* at 68a, 86a. The Board affirmed. *Id.* at 68a-69a.

In March 1998, Simmons requested that the regional office amend her claim. Pet. App. 69a; *see also id.* at 57a, 86a. Simmons claimed that her left-ear hearing loss had gotten worse, and that her worsening left-ear disability had caused right-ear hearing loss as well.

---

[1] Respondent has married and is now known as Patricia White. In order to avoid confusion, she is referred to in this brief as Patricia Simmons.

Id. at 69a. The regional office denied her claim (*id.* at 57a, 69a), but the Board remanded: among other things, the Board instructed the VA regional office to comply with the duty-to-notify and duty-to-assist provisions of the newly-enacted VCAA. *Id.* at 69a, 89a.

In March 2001, the regional office sent a letter to Simmons purporting to provide the notice required by the VCAA. Pet. App. 69a; JA 41-47. At that time, Simmons was trying to establish (1) that her right-ear hearing loss was connected to her military service, by showing that it was caused by her left-ear hearing loss (so that it would qualify for so-called "secondary service connection"[2]) and (2) an increased disability rating for her left-ear hearing loss. Pet. App. 69a, 78a-79a. The letter, however, did not inform Simmons of the evidence and information needed to support either claim. *See* JA 43-44. The regional office again denied her claims, and the Board affirmed. Pet. App. 70a-71a, 84a-85a, 96a; JA 30-40.

Simmons appealed to the Veterans Court, arguing, among other things, that the VA had failed to comply with the notice requirements of the VCAA. Pet. App. 71a-72a. The Veterans Court agreed, finding that the VA had failed to comply with the VCAA's notice requirements, including first-element notice (i.e., notice of the information necessary to substantiate her claim). *Id.* at 78a-79a, 81a. Specifically, the court found that "[a]lthough [the] letter clearly pertained to [Simmons's]

---

[2] A "disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition." 38 C.F.R. § 3.310(a).

increased-rating claim, [it] failed to inform her (1) that an increase in severity of her service-connected condition was required and (2) what types of evidence or information were needed, or could be submitted to establish that claim." *Id.* at 78a-79a. Citing *Mayfield*, the court noted that Veterans Court precedent placed the burden on the VA of proving that the first-element notice error did not prejudice Simmons. *Id.* at 80a.

The VA appealed to the Federal Circuit. Pet. App. 56a. It argued that, even assuming the VA had failed to provide the requisite notice (a factual finding not reviewable by the Federal Circuit, 38 U.S.C. § 7292(d)(2)), the veteran should have been required to prove that the VA's error caused her prejudice.

2. On the same day that the Federal Circuit decided *Simmons*, the court decided *Sanders* v. *Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), the companion case before this Court. *See* Pet. App. 1a, 56a. In *Sanders*, the Federal Circuit confronted the question that the Veterans Court considered in *Mayfield*, i.e., which party bears the burden of proving (or disproving) harmlessness when the VA fails to give the notice required by the VCAA. *See id.* at 1a. The Federal Circuit went farther than *Mayfield*: while *Mayfield* had applied the burden to the VA for first-element errors only (i.e., failures to inform the veteran of the "information ... that is necessary to substantiate the claim"), *Sanders* held that, "in light of the uniquely pro-claimant benefit system created by the VCAA" (*id.* at 20a), all VCAA notice errors should be presumed prejudicial, not just first-element notice errors, placing the burden on the VA to disprove prejudice. *Id.* at 14a. "Put simply," the court explained, "interpreting [the rule of prejudicial error] as requiring veterans to overcome a series of complex legal hurdles in order to secure the

assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

In *Simmons*, which involved a first-element notice error, the Federal Circuit relied on its decision in *Sanders*: it held that "the Veterans Court properly placed the burden on the Secretary to establish that an error in a notice the [VA] was required to give Ms. Simmons was not prejudicial." Pet. App. 56a.

SUMMARY OF ARGUMENT

Veterans who suffer from physical or mental disabilities resulting from their military service are generally entitled to disability benefits. In the VCAA, Congress provided that when a veteran applies for such disability benefits, the VA must notify the veteran of the "information ... that is necessary to substantiate the claim." The VA, however, failed to comply with the statutory provision in this case. The question now is not whether the VA erred, but, in light of the error, should the veteran or the VA have the burden of proving whether the VA's error prejudiced the veteran.

When deciding how to assign a burden of proof within a specific statutory framework, this Court starts with the statute. In this case, although the statutory language is ambiguous, the general statutory context is instructive. Congress has established an integrated framework for veterans benefits claims that consistently imposes obligations on the VA to assist the veteran in seeking and obtaining benefits. Congress's general pattern of allocating additional duties to the VA plainly informs the allocation-of-burden question at issue in this case. *See infra* Part I.A.

With regard to VCAA notice errors in particular, the statutory structure makes clear that the burden of

proving or disproving prejudice must rest on the VA, and not the veteran. This is so not simply because of Congress's general approach of placing duties on the VA to assist the veteran, but because of the central role of VCAA notice in the benefits system. Effective notice—as both an important component of the pro-claimant system and a necessary precursor to many of the other forms of assistance available—is critical to advancing Congress's objectives in this assistance-based benefits scheme. *See infra* Part I.B.

The other factors considered by courts in allocating burdens, including probabilities and practical considerations, also favor placing the burden on the VA. In particular, because of the central role that VCAA notice plays in the benefits system, these errors are likely to prejudice the veteran. And as between the VA and the veteran, the VA is better positioned to bear the burden. *See infra* Part I.C. The Government's policy arguments concerning the effects on the VA, moreover, do not alter this analysis. *See infra* Part I.D.

Rather than engaging on the merits with these considerations, the Government's brief largely sidesteps them. It centers its argument instead on a single syllogism: that, in its view, the similarly worded prejudicial error provision in the APA clearly requires allocating the burden to the party claiming error; that the APA and VJRA prejudicial error rule should be interpreted in the same way; and, therefore, that the supposedly settled meaning of the APA provision should control here. Quite apart from its failure to grapple with the factors addressed above, this approach fails on its own terms.

The Government's principal argument is that Congress ratified a settled interpretation of the APA when

it enacted the VJRA, yet there was no such settled view for Congress to ratify. To support the existence of a settled construction of the APA, the Government merely cites four court of appeals opinions decided before 1988 (only two of which as direct authority); these four cases, with narrow holdings, do not provide a basis for ratification, particularly in light of other court of appeals cases that relieved the party claiming agency error from proving prejudice. *See infra* Part II.A.

The Government's implication that, regardless of ratification, the APA rule of prejudicial error in fact has a specific meaning that should control here fails for similar reasons. In the more than 60 years since the APA was enacted, this Court has never confronted the question of which party bears the burden of proof under the APA provision. As a matter of statutory interpretation, moreover, it is far from clear that the APA should be construed to invariably place the burden on the party claiming error. And given the divergent statutory contexts, there is no reason that even a settled APA rule need be applied to the VJRA. *See infra* Part II.B.

ARGUMENT

I. Statutory Structure And Purpose Make Clear That The Burden Should Be Allocated To The VA

When this Court addresses the question of allocating the burden of proof within a statutory framework, it begins with the statute. *See, e.g.*, *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005). Where the burden allocation is not made explicit in the statute's text, the Court looks to traditional tools of statutory interpretation, such as the statutory structure and purpose, for guidance. *See Meacham* v. *Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2401 (2008) ("look[ing] at the text and structure"

to assign burden); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 493-494 (2004) (assigning burden to assure parity across statutory provisions); *see also United States* v. *First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (considering legislative history). This statutory analysis is often supplemented with practical considerations of probability as well as policy and fairness. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977); *see also* 2 *McCormick on Evidence* § 337, at 477 (6th ed. 2006). At bottom, however, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation." *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973); *see Alaska Dep't of Envtl. Conservation*, 540 U.S. at 494 n.17 ("No 'single principle or rule ... solve[s] all cases and afford[s] a general test for ascertaining the incidence' of proof burdens." (quoting 9 Wigmore, *Evidence* § 2486, at 288 (Chadbourne rev. ed. 1981)).

The VJRA's statutory language offers little indication as to how the burden should be allocated. The statutory context—the markedly pro-veteran benefits system generally and the VCAA in particular—while not directly resolving the issue, reflects repeated determinations by Congress to burden the VA as a means to assist the veteran in obtaining benefits. And more specifically, the role of the VCAA notice requirements in the benefits system demonstrates that, in that context in particular, the burden in the prejudice inquiry must rest on the VA. The notice requirements affect the veteran's ability to obtain benefits and are the linchpin of the various forms of assistance that Congress requires the VA to provide; absent proper notice, the pro-claimant features of the process are impaired,

thwarting Congress's objectives. Notice errors, in turn, are highly likely to prejudice the veteran. That probability, coupled with the VA's ability to meet its burden, confirm that the burden must be allocated to the VA. And the Government's policy arguments do not require a different conclusion.

A. The VJRA's Prejudicial Error Rule Is Part Of A Benefits Scheme That Consistently Imposes Obligations On The VA

1. The starting point of the inquiry, the statutory language, does not resolve the question of the allocation of the burden. Neither the language regarding prejudicial error in the VJRA nor the language of the VCAA's notice provision speaks directly to the allocation of the burden, leaving it an open question. To the extent that the statutory language sheds any light on the matter, it permits the allocation to vary in certain contexts. Congress has directed the Veterans Court to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2). This language—the phrase "due account" in particular—implies that the burden need not uniformly rest on one side or the other across all contexts, and that it could instead be allocated differently depending on the nature of the claim of error. *See* Berger, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137, 160 (1967) ("The need for flexibility ... was met by leaving the courts free to take '*due* account ... of the rule of prejudicial error.' 'Due' means 'just and proper,' i.e., reasonable in all the circumstances, as in 'due care.' " (emphasis and alterations in original)).[3]

---

[3] The Government struggles to give meaning to this "due account" language, and appears to admit the possibility that the lan-

2. The VJRA prejudicial error rule is part of a comprehensive benefits scheme designed by Congress that reflects its persistent imposition of duties on the VA and other efforts to structure the process to assist the veteran in obtaining benefits.

In recognition of the long-held understanding of the special obligation that the country owes to its veterans,[4] Congress has created a benefits system "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985).[5] The veterans benefits system is "unlike any

---

guage may permit the Veterans Court flexibility in applying the rule. Pet. Br. 18.

[4] "The origin of legislation providing relief for soldiers and sailors disabled in the service of their country has been traced to Elizabethan England and a statute providing pensions to veterans who had served since 1588, the year of the Spanish Armada. The American colonies continued this tradition of providing pensions to maimed and disabled soldiers, and shortly after the Declaration of Independence, the Continental Congress promised to provide pensions to those disabled in the cause of American independence." H.R. Rep. No. 100-963, at 9 (1988) (citing *Federal Laws Relating to Veterans of Wars of the United States (Annotated)* 25 (GPO 1932)).

[5] *See, e.g.*, 146 Cong. Rec. H6786, H6789 (daily ed. July 25, 2000) ("We have an obligation to make sure that our veterans are given a hand in receiving the benefits that they have worked for, that they have in some cases bled for, and have certainly earned in the defense of our country." (statement of Rep. Reyes)); *Nolen* v. *Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (noting "that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" (internal quotation marks omitted)); 146 Cong. Rec. S9211, S9212 (daily ed. Sept. 25, 2000) (Congress has established a "relationship between the [VA] and the claimant [that is] unique in the Federal Government" (statement of Sen. Rockefeller)).

other adjudicative process." H.R. Rep. No. 105-52, at 2 (1997). It eschews the traditional adversarial model of claims adjudication and instead reflects an integrated assistance-based approach.

The assistance offered to the veteran, and the resulting duties placed on the VA, take various forms throughout the process. At the outset, the VCAA notice provisions at issue in this case require the VA to inform the veteran of what is necessary to make out his claim and whether the veteran or the VA is responsible for obtaining the relevant evidence and information. 38 U.S.C. § 5103(a). Once the veteran is aware of the contours of his claim, the VA is required to assist claimants by making "reasonable efforts" to obtain evidence to substantiate a claim, *id.* § 5103A(a)(1), including by helping the veteran obtain relevant records, *id.* § 5103A(b)(1), and, in the case of disability compensation, by "providing a medical examination or obtaining a medical opinion [for the veteran] when such an examination or opinion is necessary to make a decision on the claim," *id.* § 5103A(d)(1).

The statute also includes structural safeguards intended to make it easier for the veteran to prove his claim. It breaks a tie "regarding any issue material to the determination of a matter" in favor of the veteran: the VA must give the "benefit of the doubt" to the veteran whenever "there is an approximate balance of positive and negative evidence." 38 U.S.C. § 5107(b). And the judicial review process similarly operates in favor of the veteran: only the veteran and not the VA may seek review in the first place, and factual findings in the veteran's favor are not reviewable. *Id.* §§ 7252(a), 7261(a)(4). Judicial review also perpetuates the statutory requirement favoring the veteran in the case of a tie; the court must "take due account" of the

requirement that the VA give the "benefit of the doubt" to the veteran. *Id.* § 7261(b)(1); *see also id.* § 5107(b).

3. The VCAA, the home of the notice provisions at issue in this case, is a prime example of Congress's approach to veterans benefits claims: When faced with a question whether to impose obligations on the VA or the veteran as part of the claims process, Congress has chosen to burden the VA and, in turn, ease the process for the veteran.

The VCAA was largely a response to the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477 (1999), *withdrawn*, 14 Vet. App. 174 (2000) (per curiam). *Morton* held that the VA's statutory requirements to assist the veteran did not apply unless the claim was first shown to be "well-grounded." *Id.* at 486. The *Morton* Court purported to "discern[] a Congressional intent to create" a process whereby only claimants "who have met the requisite burden ... are entitled to the benefit of VA's obligations to assist," *id.* at 480, and purported to find that this burden on the claimant reflected a "'policy that implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which—as well grounded—require adjudication,'" *id.* (quoting *Grivois* v. *Brown*, 6 Vet. App. 136, 139 (1994)).

Congress promptly rejected such efforts to restrict the VA's obligation to assist all claimants, and not just those whose claims were deemed "well-grounded." When enacting the VCAA, the House Committee explained, "[t]he Committee's intent is to overrule that portion of the decision in *Morton* that found an implied limitation on VA's authority to provide assistance to claimants who had not submitted 'well-grounded'

claims." H.R. Rep. No. 106-781, at 11 (2000). The Act not only rejected efforts to restrict fulfillment of the VA's obligations to assist claimants and made clear that the VA must assist the veteran in pursuing his claims regardless of whether the claim was "well-grounded," but it also supplemented the assistance that the VA was obligated to provide. *See* 146 Cong. Rec. at S9212 ("I believe that this bill restores VA to its pre-*Morton* duty to assist, as well as enhances VA's obligation to notify claimants of what is necessary to establish a claim and what evidence VA has not been able to obtain before it makes its decision on the claim." (statement of Sen. Rockefeller)).[6]

* * *

Thus, although statutory context does not directly answer the question of burden allocation under the prejudicial error rule, it does inform the burden inquiry,[7] which asks whether Congress would impose a burden on the VA or the veteran to meet a requirement in the claims process.

---

[6] *See also* 146 Cong. Rec. H9912, H9914 (daily ed. Oct. 17, 2000) (describing the bill as "enhanc[ing] the notice that the Secretary is now required to provide to a claimant"); *see also Quartuccio* v. *Principi*, 16 Vet. App. 183, 186-187 (2002) ("The intent of Congress, as the plain language of the VCAA indicates, was to expand the duties of the Secretary to notify the claimant, not to restrict them.").

[7] Respondent's argument does not rest on the idea that the VCAA should be read to impliedly repeal the VJRA prejudicial error rule, nor on the view that the VCAA should displace the VJRA. *See* Pet. Br. 19-20. Rather, the VJRA itself manifestly leaves open the question of burden allocation, and the benefits system and VCAA offer a basis to assign the burden to the VA for notice errors.

B. The Central Role Of VCAA Notice In The Statutory Structure Governing Benefits Claims Demonstrates That The Burden Must Rest On The VA, Not The Veteran

The notice required by the VCAA is critical to the overall benefits system; it is not only an important part of the assistance provided to the veteran in its own right, but much of the other required assistance hinges on compliance with the notice provisions. VCAA notice's integral role in the system requires that, where the veteran shows that the VA has failed to provide notice, the burden as to prejudice must rest with the VA, not the veteran. This conclusion, reinforced by the statutory context in which Congress has repeatedly sought to assist the veteran by burdening the VA, is necessary because otherwise the prejudicial error rule would frustrate the purpose not merely of the notice requirements, but of the broader goals of the benefits scheme.

The notice provisions are not simply an important component of the benefits system; they play a formative role. The timing of the notice is significant—at the very start of the adjudicative process, before the regional office makes an initial decision on the veteran's claim. *See* 38 U.S.C. § 5103(a).[8] As a result, notice "en-

[8] The pre-VCAA notice requirement provided only that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." 38 U.S.C. § 5103 (1999). The Federal Circuit had interpreted this notice provision as limited in scope, requiring the VA to provide notice of necessary evidence only "when the Department is aware, or reasonably should be aware, of the existence of such relevant evidence." *McKnight* v. *Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (per curiam).

sure[s] that the claimant's case is presented to the initial decisionmaker with whatever support is available, and ... ensure[s] that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant." *Mayfield*, 444 F.3d at 1333; *see also Kent* v. *Nicholson*, 20 Vet. App. 1, 9 (2006) (notice provisions protect the right of claimants to have "a meaningful opportunity to participate in the adjudication of [their] claims").[9]

Significantly, notice failures have ramifications for the entire claims process. If the VA does not inform claimants of the necessary evidence at the beginning of the process, claimants may fail to obtain supporting lay statements, schedule additional medical examinations, or identify relevant records for the VA to obtain. Not only does a notice failure impede the veteran in doing his part to advance his claim, but it also likely renders meaningless much of the other assistance available from the VA. The notice alerts the veteran to the evidence and information needed, what part the VA will be providing, and what the veteran must seek out. Among other things, the veteran can seek the VA's assistance in obtaining required medical evaluations. *See* S. Rep. No. 106-397, at 23 (2000) ("While it is the VA's duty to obtain information and evidence, the Committee expects that claimants *who are made aware of what*

---

[9] Accordingly, the VA itself has recognized that Congress intended notice to "ensur[e] proper development of the record the first time a claimant submits an application for benefits." VA General Counsel Memorandum 8-2003 ¶ 2 (Dec. 22, 2003); *see also id.* (noting that "the VCAA was drafted so as to impose on VA the duty to notify early in the claim process" because "the drafters wanted claimants to know early in the claim process what was necessary to substantiate their claims").

is needed—or what cannot be found—will cooperate with VA to locate and obtain the required evidence if they are able to do so." (emphasis added)).

More specifically, much of the assistance that Congress requires of the VA hinges on effective notice. The VCAA imposes on the VA a duty to make reasonable efforts to assist claimants in obtaining necessary evidence. 38 U.S.C. § 5103A(a)(1). As part of this duty to assist, the VA is required to "make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary." *Id.* § 5103A(b)(1). And for claimants seeking disability compensation, the VA is required to "provid[e] a medical examination ... when ... necessary." *Id.* § 5103A(d)(1). If the veteran does not receive notice of what evidence is necessary, or which evidence the veteran is responsible for, the veteran is unlikely to be able to make use of these other forms of assistance. The veteran, for example, is less likely to identify the documents for the VA, triggering the VA's obligation to try to obtain the records. The failure of the VA to provide the requisite notice thus not only severely hinders the veteran's ability to obtain benefits, but, by eliminating the linchpin of the assistance provided, it also allows the VA to avoid some of its other statutory obligations.

In fact, Congress's deliberate efforts to cultivate a pro-claimant system compound the effects of insufficient notice. Congress has sought to establish a trusting relationship between the veteran and VA. "[R]eliance on, and faith in what Congress clearly intended to be a paternalistic means for addressing veterans' claims, ... [can] lull[] [a claimant] into accepting and relying upon the advice and aid of the government." *Bailey*, 160 F.3d at 1365. Insufficient notice is

all the more problematic because the system fosters the veteran's reliance. The negative impact of VCAA notice failures is exacerbated by the fact that many claimants are unrepresented by counsel when they file a claim because they are statutorily prohibited from paying an attorney in connection with the initial proceedings before the agency. *See* 38 U.S.C. § 5904(c)(1).

Although all of the statutory notice provisions are central to the process, the problems with and consequences of defective notice are most readily apparent for first-element notice errors. First-element notice is the most fundamental, requiring the VA to inform the veteran of "evidence ... that is necessary to substantiate the claim." 38 U.S.C. § 5103(a); *see also Mayfield*, 444 F.3d at 1335 n.3 (describing first-element notice as the "core requirement" of VCAA notice). The substantive impact of first-element notice error is severe, as it renders it unlikely that the claimant will provide such evidence or ensure that the agency obtains it; as a result, his claim is likely to be denied.[10] Thus, as the Veterans Court observed, a first-element notice error "preclud[es] [a claimant] from participating effectively in the processing of [the] claim, which would substantially defeat the very purpose of section 5103(a) notice." *Mayfield*, 19 Vet. App. at 122. The impact of a notice error is most troubling where the notice is not simply incomplete, but incorrect, such as when it incorrectly states the evidence necessary to support a claim. Be-

---

[10] *See Paralyzed Veterans of Am.* v. *Secretary of Veterans Affairs*, 345 F.3d 1334, 1345-1346 (Fed. Cir. 2003) (noting that the VCAA notice provisions "apply *only* when a claim cannot be granted in the absence of additional necessary information described in the notice" (emphasis in original)).

cause of the nature of the system and the veterans' unique relationship with the VA, the claimant can be misled into believing what the notice says and as a result may fail to provide the evidence actually needed to substantiate the claim.

The Government asserts that the pro-claimant nature of the benefits system is irrelevant because a proceeding in the Veterans Court "follows the traditional adversarial model of appellate litigation." Pet. Br. 24. Yet Congress built pro-veteran protections into the judicial review scheme as well.[11] And, in any event, the Government's logic fails: the error at issue occurred in the proceedings before the agency, which were not only non-adversarial, but which would be effectively thwarted by the Government's proposed burden allocation. Where a notice error is at issue, the case has likely left the non-adversarial context because of the VA's failure to comply with its notice obligations. The Government cannot use the VA's own failure to live up to its statutory obligations in the non-adversarial context as a reason to impose duties on the veteran.

Finally, the Government's effort to place the burden on the veteran runs counter to Congress's recent efforts. Congress's reaction to *Morton*—namely, the VCAA—reinforces its intent to burden the agency for the benefit of the veteran. In this case, the Government is attempting to resurrect the type of approach

---

[11] *See* 38 U.S.C. § 7261(a)(4) (factual findings of the Board that are favorable to the claimant may not be overturned); *id.* §§ 7261(b)(1), 5107(b) (Veterans Court must "take due account" of the fact that the VA was required to give the "benefit of the doubt" to the veteran, breaking certain evidentiary ties in the veteran's favor).

that Congress rejected when it enacted the VCAA. Specifically, by assigning the burden of prejudice to the veteran, the Government essentially seeks to excuse the VA's noncompliance with its notice requirements except where the veteran shows that the notice would make a difference. But in overturning *Morton* with the VCAA, Congress already determined that the VA cannot fail to assist all veterans even if it perceives such assistance to be unnecessary based on the veteran's failure to show the merit of his claims. Especially given that the notice requirements at issue here are part of the very same statute that overturned *Morton*, the Court should be wary of efforts to lighten the VA's load and force the veteran to demonstrate the merit of his claims before receiving the assistance from the VA to which he is entitled by statute.

C. The Likelihood Of Prejudice From Notice Errors And The VA's Superior Ability To Meet Its Burden Support Allocating The Burden To The VA

Concerns about frustrating congressional purpose, in turn, indicate that a notice error is likely to result in prejudice to the veteran, a factor counseling in favor of allocating the burden to the VA. Moreover, the related question—which party can better bear the burden—confirms this result because, as the nature of the benefits system suggests, the VA is better equipped than the veteran to meet its burden under the prejudicial error rule.

1. The question of probability—whether the error is likely to create prejudice—is relevant to the burden inquiry. *See, e.g., International Bhd. of Teamsters*, 431 U.S. at 359 n.45 ("[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities"); 21B Wright & Graham, *Federal Prac-*

tice & Procedure § 5122, at 403 (2d ed. 2005) (courts normally "place the burdens of proof on the party asserting the least probable fact or set of facts"). In this case, the probabilities go hand in hand with the structural and congressional intent questions discussed above.

VCAA notice, required at the very beginning of the process, ensures that the veteran is aware of what evidence and information is needed to support the claim for benefits and, in turn, how to pursue his claim. It also enables the veteran to make use of other VA assistance because, for instance, it puts the veteran on notice of what evidence the VA could help to obtain. Without sufficient notice—particularly first-element notice—the veteran is left in the dark as to what he needs to do to make his claim successful and how to go about doing so. And, because the veterans benefits system encourages reliance on the VA, these notice errors are all the more likely to be problematic, particularly because the veteran is unlikely to be represented by counsel. *See also supra* Part I.B. For all of the reasons that notice errors impede Congress's objectives, they also are likely to lead to prejudice.

Indeed, both the Veterans Court and the Federal Circuit have recognized that the central role of notice means that a notice error is likely to prejudice the veteran. The Veterans Court, which in other contexts places the burden on the veteran,[12] made an exception

---

[12] *See Moore* v. *Nicholson*, 21 Vet. App. 211, 214 (2007) ("In general, the appellant bears the burden of persuading the Court that the Board decision below is tainted by a prejudicial error that warrants reversing or remanding the matter for the investment of the additional time and effort that would be required by VA to produce a new decision in his case.").

in *Mayfield*, but limited it to first-element notice errors because of their critical role in the process: "The natural effect of such [first-element] error ... would constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the claimant] from participating effectively in the processing of [the] claim, which would substantially defeat the very purpose of section 5103(a) notice." *Mayfield*, 19 Vet. App. at 122.[13] The Federal Circuit also allocated the burden to the VA, but did so for all VCAA notice errors. "With respect to first-element notice errors," the court "agree[d] with the Veterans Court that the natural effect of such an error would ... 'preclud[e] [the appellant] from participating effectively in the processing of [the] claim,' defeating the very purpose of § 5103(a) notice." Pet. App. 17a (quoting *Mayfield*, 19 Vet. App. at 122 (third alteration in original)). For the Federal Circuit, however, the other notice elements had the same natural effect and thus warranted placing the burden on the VA when it committed those errors as well. *Id.* at 17a-18a.

The Government attempts to argue that notice errors are not likely to produce prejudice (Pet. Br. 31-35), but its arguments are unavailing. It asserts that prejudice should not be presumed because "the VA will likely have taken numerous steps to assist claimants in

---

[13] *Mayfield*, 19 Vet. App at 122 ("Accordingly, even though the appellant has failed to assert specifically how she was prejudiced by this asserted notice error, the specificity and substantive nature of her asserted notice error is, as discussed above, such as to make it one that has the natural effect of producing prejudice and thus to shift to the Secretary the burden of demonstrating that there was clearly no prejudice to the appellant based on any failure to give notice as to this element.").

obtaining necessary evidence and to inform them of any deficiencies in the evidence in a case." *Id.* at 34. This argument is problematic for several reasons. First, it turns the statute on its head; if Congress had placed fewer requirements on the VA—had not gone so far out of its way to protect and support the veteran in the claims process—the veteran (according to the Government) would have a better argument for placing the burden on the VA.

Second, it completely ignores the role of notice in ensuring that the other forms of assistance are available and that the veteran is in a position to take advantage of that assistance. Due to the centrality of VCAA notice, access to other assistance is impaired when the VA fails to provide that notice. *See supra* Part I.B (describing, as one example, the duty to locate records under Section 5103A(b), which hinges on the veteran identifying the records, which in turn depends on the veteran receiving notice of the potential relevance of the records).[14]

Third, the Government's argument (Pet. Br. 33-34) relies largely on the VA's obligations that arise *after* the VA has already denied the claim. *See* 38 U.S.C. § 5104(b) (VA must provide statement of reasons for denying a claim); *id.* § 7105(d)(1) (VA must provide

---

[14] The Government cites 38 C.F.R. § 3.103(c)(1) and (2) for the proposition that the claimant is "entitled to a hearing 'at any time on any issue involved in a claim,' for the purpose of presenting evidence." Pet. Br. 32. Such hearings, however, are only provided "[u]pon request." 38 C.F.R. § 3.103(c)(1). If the veteran is not aware of the evidence needed to substantiate his claim, it is unreasonable to expect that he will request a hearing to present such evidence.

statement of the case following a veteran's notice of disagreement with a denial of claim); *see also Mayfield*, 444 F.3d at 1333 (VA's duty to notify cannot be "satisfied by various post-decisional communications"). And if, in a particular case, the VA has truly "taken numerous steps designed to assist claimants in obtaining necessary evidence and to inform them of any deficiencies in the evidence in a case" (Pet. Br. 34), it will not be difficult for the VA to demonstrate that its VCAA error was harmless. *See infra* Part I.C.2.

2. The proper allocation of the burden is confirmed by the divergent abilities of the VA and veteran to satisfy the burden, given their respective access to the relevant information. *See NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (allocation of the burden supported by "practicality" based on the nature of the proof required and the parties' respective abilities to meet the relevant burden); 21B Wright & Graham, *Federal Practice & Procedure* § 5122, at 403-404 ("[C]ourts look to see whether one party has superior access to the evidence needed to prove the fact. If so, then that party must bear the burdens of proof. ... [T]he burden should be cast 'on whom it would sit lightest.'").

In cases where there is no prejudice stemming from the VA's failure to comply with its notice obligations, the VA is well-equipped to demonstrate as much. According to Federal Circuit case law, the VA can meet the burden of rebutting a presumption of prejudice once the veteran demonstrates a notice error in several ways, including by showing: "(1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not have been

awarded as a matter of law." Pet. App. 12a. If the VA has in fact complied with its duties, then it should be able to show that the veteran was not prejudiced. And in many cases, a lack of prejudice will be obvious from the record.[15] A claimant's non-entitlement to benefits as a matter of law also may be clear from the claimant's averments. *See Valiao* v. *Principi*, 17 Vet. App. 229, 232 (2003) ("Where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision, the case should not be remanded for development that could not possibly change the outcome of the decision.").

The Government argues that the burden should rest on the veteran because, in its view, the veteran "is more likely to have knowledge of the relevant facts." Pet. Br. 36. But this is by no means clear. For instance, the VA has better access to some facts, such as certain records, which would be further supplemented by specific knowledge it gained when assisting the veteran.

Indeed, the veteran faces obstacles to demonstrating prejudice. As the Government suggests, if the burden to show prejudice were placed on the veteran,

---

[15] *See, e.g., Holmes* v. *Peake*, No. 06-0852, 2008 WL 974728, at *2 (Vet. App. Apr. 3, 2008) (claimant "demonstrated his actual knowledge of what was required to substantiate a higher disability rating when he specifically argued that he was entitled to a 30% disability rating and attached a copy of the pertinent rating schedule"); *Clark* v. *Peake*, No. 05-2422, 2008 WL 852588, at *4 (Vet. App. Mar. 24, 2008) ("appellant, throughout the pendency of his claim, has made submissions showing that he had actual knowledge of the need to submit evidence showing the effect that the worsening or increase of his foot condition had on his employment and daily life").

claimants might be required to show "what additional evidence they might have submitted" had proper notice been given. Pet. Br. 36.[16] But Congress has specifically tasked the VA with assisting the claimant in determining what additional evidence he should submit to substantiate a claim, and with helping to find that evidence. *See* 38 U.S.C. §§ 5103(a), 5103A. If Congress thought that it would be easy for the veteran to identify and find the additional evidence needed to substantiate a claim, such statutorily-mandated assistance would be unnecessary. And, in fact, this demonstrates just how contorted the Government's rule would be: after the VA has failed to comply with its obligations to inform the veteran of the necessary evidence, the veteran would be obligated to reveal to the court the same evidence he did not obtain with the VA's notice and assistance. *See Cordova* v. *Peake*, No. 06-0309, 2008 WL 834006, at *3 (Vet. App. Mar. 24, 2008) ("[T]he Board denied [the claimant] an increased rating, in part, due to the lack of ... specific evidence that [the claimant] was not notified that he could submit to substantiate his claim.").

The unique circumstances of veterans benefits claimants also make it unlikely that Congress would have wanted to place the burden to show prejudice on the claimant. Veterans are ordinarily unrepresented at

---

[16] *Cf. Hunt* v. *Nicholson*, No. 05-2812, 2007 WL 1659062, at *3 (Vet. App. May 11, 2007) (in a pre-*Sanders* case, noting that "[w]hen the appellant alleges second- or third-element error, '[p]rejudice can only arise ... if an appellant demonstrates that he or she failed to submit evidence as a result of not being advised to do so, or that the Secretary failed to obtain evidence that he should have obtained'" (quoting *Overton* v. *Nicholson*, 20 Vet. App. 427, 436-437 (2006))).

the time of filing in the Veterans Court, and a fifth remain unrepresented at the conclusion of proceedings.[17] Many veterans, moreover, suffer from debilitating mental and physical health problems[18] that would likely hamper their ability to prove prejudice.

D. The Government's Policy Arguments Do Not Override The Statutory Structure And Purpose

The Government has raised two policy arguments relating to the functioning of the veterans benefits system in support of its conclusion that the burden should be allocated to the veteran rather than the VA. Neither is persuasive.

The Government cites concerns about the effects on the claims system of allocating prejudice to the VA

---

[17] In 2007, 53% of the claimants were unrepresented at the time of filing and 19% were unrepresented at the close of proceedings. United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited Oct. 14, 2008).

[18] *See* 146 Cong. Rec. at H6789 (noting effect of "poor health" on ability to obtain evidence); *see also* Alvarez, *War Veterans' Concussions Are Often Overlooked*, N.Y. Times, Aug. 25, 2008, *available at* http://www.nytimes.com/2008/08/26/us/26tbi.html?_r=2&hp&oref=slogin&oref=slogin ("As many as 300,000, or 20 percent, of combat veterans who regularly worked outside the wire, away from bases, have suffered at least one concussion .... [T]ens of thousands ... have longer-term problems that can include, to varying degrees, persistent memory loss, headaches, mood swings, dizziness, hearing problems and light sensitivity."); Cohen, *Talking Veterans Down from Despair*, N.Y. Times, Apr. 22, 2008, *available at* http://www.nytimes.com/2008/04/22/us/22suicide.html?scp=10&sq=veterans&st=cse ("roughly one in five veterans of Iraq and Afghanistan has symptoms of post-traumatic stress disorder").

rather than the veteran. It asserts that the Veterans Court should not presume prejudice in VCAA notice error cases because "such a presumption would generate a large number of remands." Pet. Br. 36. In support of this argument, the Government states that it receives more than 800,000 benefits claims per year. *Id.* at 36-37.

This policy argument fails for several reasons. First, this figure vastly overstates the possible effects of allocating the burden in the prejudice inquiry to the VA. In 2007, the Veterans Court received 4,644 appeals, and it remanded (in full or in part) only 2,045 cases.[19] Those remands already included remands relating to presumed prejudice from first-element notice errors, because that has been the rule since 2005. Accordingly, to hold that the burden rests on the VA for first-element notice errors would have no effect at all. Any additional burden on the VA from a presumption of prejudice for all notice errors would constitute only the incremental remands from second- and third-element notice errors. There is nothing to suggest that presuming prejudice would add substantially to the number of remands. As noted, the Government has ample means to demonstrate the absence of prejudice. Second, the Government can avoid any additional burdens on the system simply by complying with its obligations to provide notice in the first place. Third, policy arguments seeking to streamline the benefits system and unburden the VA should be viewed with skepticism; as discussed *supra* Part I.B, in the VCAA, Con-

---

[19] *See* United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.uscourts.gov/documents/Annual_Reports_2007.pdf (last visited Oct. 14, 2008).

gress rejected similar efforts reflected in the *Morton* case, making clear that such interests do not trump Congress's efforts to assist the veteran.

The Government has also previously sought to support its reading—which would give the VA more flexibility to avoid its notice obligations—by arguing that the notice requirements are difficult for the VA to satisfy. Pet. 23. Any challenge the VA faces in meeting its statutory obligations is neither here nor there for purposes of allocating the burden in a prejudicial error inquiry where the VA has not complied with these obligations. Any argument to allocate the burden based on the challenges posed in complying with the notice requirements effectively seeks to relieve the VA of its statutory obligations. *See Sugar Cane Growers Coop. of Fla.* v. *Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) ("[T]he government would have us virtually repeal section 553's requirements: if the government could skip those procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not presented informally—section 553 obviously would be eviscerated.").

* * *

The fundamental role of notice in effectuating Congress's goals for the benefits process, coupled with practical considerations regarding the likelihood of error and the relative challenges of meeting the burden, all counsel heavily in favor of allocating the burden to the VA rather than the veteran for VCAA notice errors. The ambiguous statutory language plainly leaves room for this allocation, and the statutory context—a benefits scheme in which Congress repeatedly has burdened the VA for the benefit of the veteran—only con-

firms the propriety and the consistency with congressional intent of requiring the VA to demonstrate the lack of prejudice.[20] An additional tool of statutory interpretation removes any doubt regarding the proper allocation of the burden in the context of notice errors: Under the "well-established rule of statutory construction ...[,] when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'" *National Org. of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)); *see also, e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991) (referring to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").[21]

---

[20] In an analogous context, involving an administrative challenge brought by Native Americans who, like veterans, receive exceptional treatment under the law because of the government's special obligations to them, *see Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976), the Tenth Circuit declined to allocate the burden as to prejudice to the party challenging agency action. In *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982), in which a tribe sued the Interior Department and other defendants for failing to comply with notice regulations when advertising oil leases on the tribe's reservation, the Tenth Circuit concluded that the party defending agency error had the burden to disprove prejudice. The tribe was appropriately relieved of the burden given its inferior access to relevant information and "the underlying policy of protection of the interests of the Indians for whose benefit the regulation was adopted." *Id.* at 1336-1337.

[21] The Government asserts—without citation to authority—that the pro-veteran canon of statutory construction does not apply because the prejudicial error rule is "a procedural rule," rather than a "substantive 'provision[] for benefits.'" Pet. Br. 23. Yet the pro-veteran canon has not been limited to substantive provisions for benefits, but rather has been explicitly applied to notice provi-

II. THE GOVERNMENT IS INCORRECT THAT THE APA REQUIRES THE VETERAN TO BEAR THE BURDEN OF PROVING PREJUDICE UNDER THE VJRA

The Government's brief—largely ignoring statutory context and structure—centers on the incorrect propositions that the APA's prejudicial error rule has an established meaning that would allocate the burden to the claimant, and that the APA and the VJRA must be interpreted consistently. The Government's core argument is that in the 1988 VJRA Congress ratified a uniform understanding of the APA. Yet there was no such settled and uniform view for Congress to ratify. And the Government's more general argument that the APA's meaning should be applied to the VJRA misses several steps. First, it is unclear—given the different contexts—that the APA and VJRA should be interpreted to have the same meaning. And second, contrary to the Government's apparent assumption, the APA does not have a clear rule requiring allocation of the burden to the claimant.

---

sions as well as other "procedural" provisions. *See McKnight*, 131 F.3d at 1485 (construing the pre-VCAA notice provision); *McGee* v. *Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008) (finding the canon relevant to an interpretation of 38 U.S.C. § 7104(a), which requires the Board to consider "applicable provisions of law"); *see also Boone* v. *Lightner*, 319 U.S. 561, 575 (1943) (applying the pro-veteran canon to interpret a Soldiers' and Sailors' Civil Relief Act provision granting a stay of court proceedings against a serviceman unless the ability to conduct a defense was not "materially affected" by service). Moreover, judicial review provisions such as the rule of prejudicial error are part of a broader legislative scheme whose goal is to ensure that veterans receive the benefits to which they are entitled. *See* S. Rep. No. 100-418, at 29 (1988) ("The basic purpose of [the bill adding judicial review] is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled.").

A. The VJRA Did Not Ratify A Uniform Interpretation Of The APA In 1988 Because There Was No Such Uniform Interpretation

The Government argues that, by the time the VJRA was enacted in 1988, an APA burden regime that invariably placed the burden on the party claiming error had become "entrenched" in the courts of appeals, and that Congress implicitly adopted that rule in the VJRA. Pet. Br. 9, 16. Yet there was no such uniform view: the scattered court of appeals decisions cited by the Government had more limited holdings and, in fact, other courts of appeals had relieved the party claiming error from the burden of establishing prejudice.

As an initial matter, ratification is only one tool of statutory interpretation, and must be considered along with other such tools. *See* 2B Singer & Singer, *Statutes and Statutory Construction* § 49:4, at 24 (7th ed. 2008) ("Contemporaneous and practical interpretation is just another aid to statutory construction, and must be weighed against other factors pertinent to the determination of legislative intent."). Any ratification argument must, at a minimum, be weighed against the statutory purpose and context; the Government is therefore plainly incorrect to suggest that its ratification argument, standing alone, "suffices to resolve this case." Pet. Br. 9.

But even on its own terms, the Government's ratification argument fails, as there was no uniform interpretation of the APA's rule of prejudicial error at the time that Congress passed the VJRA. Nine months before the VJRA was enacted, the D.C. Circuit held that it was "normally inappropriate" to impose the burden of proving prejudice on the party challenging agency action "where the agency has completely failed to comply with [5 U.S.C.] § 553." *McLouth Steel Prods.*

Corp. v. *Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988); *see also Braniff Airways, Inc.* v. *CAB*, 379 F.2d 453, 465 (D.C. Cir. 1967) ("Reversal is not required by the fact that an agency made an 'error' if it is shown that the error was not 'prejudicial.'"). Other courts of appeals had similarly relieved the party claiming error from establishing prejudice in certain contexts. *See U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (refusing to "assume that there was no prejudice to petitioners" and stating that "[a]bsence of such prejudice must be clear for harmless error to be applicable"); *see also Jicarilla Apache Tribe*, 687 F.2d at 1335-1336 (placing burden on party defending agency error in suit brought by Native Americans).[22]

To support its ratification argument, the Government merely cites four pre-1988 cases (and uses a "cf." signal for two of the four). Pet. Br. 15. And even the four pre-1988 cases cited by the Government do not hold that the burden is always placed on the party claiming error, regardless of the type of error at issue. In two of the cases, the court did not purport to articulate a general rule; one of those cases involved a technical error, and, in the other, the court did not determine whether there was error at all. *See City of Frankfort* v. *FERC*, 678 F.2d 699, 708 (7th Cir. 1982) (involving an "alleged technical deficiency" in the agency's use of the

---

[22] The Government claims that *Jicarilla* "did not interpret the APA at all." Pet. Br. 15 n.4. Yet it is clear that the case presented a challenge under the APA; it is also clear that the agency erred, that the parties defending the error relied on Section 706, and that the court cited Section 706. *See Jicarilla*, 687 F.2d at 1332, 1333 n.5, 1335. Although the language of the case is ambiguous, it is properly read as holding that Section 706 does not require excusal of substantial errors. *See id.* at 1336.

word "affirm" rather than "adopt"); *Beef Nebraska, Inc.* v. *United States*, 807 F.2d 712, 714 n.1 (8th Cir. 1986) (stating that "[e]ven if" there was error the petitioner had failed to show prejudice). The third case, *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir. 1967), derived its burden rule from *Palmer* v. *Hoffman*, 318 U.S. 109 (1943); but, as this Court has held, *Palmer* places the burden on the petitioner only for certain types of errors. *See also infra* Part II.B.2 (discussing *Seine* and *Palmer*). The final pre-1988 case involved allegations of agency delay, not error in the typical sense. *See City of Camden* v. *Department of Labor*, 831 F.2d 449, 451 (3d Cir. 1987) (citing cases in the specific context of agency delay); *see also Dixon* v. *United States*, 548 U.S. 1, 14 (2006) (rejecting petitioner's attempt to rely on a court of appeals case because "[p]roperly understood" the case did not stand for the proposition urged).

These few cases with limited holdings do not support the Government's contention that a uniform, sweeping rule regarding the burden of proof existed in 1988, especially given that other courts of appeals had at times relieved the party claiming error from demonstrating prejudice. *Cf. Bragdon* v. *Abbott*, 524 U.S. 624, 644 (1998) (ratification where "[e]very court which addressed the issue" had reached the same conclusion); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 380 (1982) (ratification where judicial interpretations were "uniform and well understood").

The Government's efforts to supplement its ratification argument by relying on the definite article "the" used to refer to the prejudicial error rule and scant legislative history are unavailing. By reference to "the prejudicial error rule," the statute is simply referencing the legal concept of harmless error. Contrary to the

Government's suggestion (Pet. Br. 12), the "the" does not require any more—and plainly does not require any particular burden scheme where the statutory language of both statutes does not address burdens and there is no accepted rule as to burden allocation. For similar reasons, the Government's reliance on a VJRA Senate Committee Report that quotes a few sentences from the Ninth Circuit's decision in *Seine*, 374 F.2d 974, is misplaced. The Government concludes from the Report's citation of *Seine* that the Committee interpreted the prejudicial error rule to allocate the burden of demonstrating prejudice to the side asserting error. Pet. Br. 16. The Senate Report, however, merely quotes *Seine*'s general statement that "administrative order[s] should be enforced notwithstanding" "errors [that] are deemed to be minor and insubstantial," but makes no reference to *Seine*'s allocation of the burden in that case. *See* S. Rep. No. 100-418, at 61 (quoting *Seine*, 374 F.2d at 981). This is an insufficient basis for inferring that Congress contemplated a particular burden allocation for all errors. *See Thomas* v. *Arn*, 474 U.S. 140, 150 n.9 (1985) (refusing to find congressional intent to adopt statement from Ninth Circuit case quoted in House Report because Congress cited the case for one proposition, "and not for any other proposition" in the case).

B. The Government's Argument That The VJRA Prejudicial Error Rule Should Be Interpreted Identically To The APA Rule Relies On Two Faulty Assumptions

Although the Government focuses on a ratification argument, it implies throughout its brief that the burden under the APA rule of prejudicial error is clear,

and that the meaning under the APA should decide the meaning of the VJRA rule in this case.[23] This argument fails in light of the differences in the statutory contexts and flaws in the Government's assumption as to the meaning of the APA rule.

1. In light of the differences in the statutory schemes, the interpretation of the VJRA and APA prejudicial error rules need not be the same

As detailed above, *supra* Part I, statutory context is critical to the allocation of burdens. Here, the statutes pertain to two manifestly different regimes, which justifies divergent treatment of the prejudicial error rule language.

Congress specifically designed the veterans benefits regime—and judicial review of that regime—to differ from other administrative schemes. When Congress first provided for judicial review of veterans benefits claims in 1988, it could have brought this review under the APA simply by repealing a statute precluding judicial review of such decisions,[24] or by di-

---

[23] *See, e.g.*, Pet. Br. 8 (burden allocation under Section 706 is "settled"); *id.* at 9 (burden allocation under Section 706 is "well-established"); *id.* at 11 (burden allocation under Section 706 has "settled construction"); *id.* at 12 ("[l]inguistic consistency" requires placement of burden on veteran because that is what Section 706 requires); *id.* at 13 ("parallel statutory text ... leads to the conclusion that Section 7261(b)(2) unambiguously forecloses the interpretation reached by the Federal Circuit"); *id.* at 14 (Federal Circuit departed from "established APA rule"); *id.* at 23 (meaning of Section 7261 is "not ambiguous" because of the "well-settled meaning of the language in the APA").

[24] *See* 38 U.S.C. § 211(a) (1988); 5 U.S.C. § 701(a).

rectly cross-referencing the APA.[25] Instead, Congress chose to establish a different, separate judicial review system.[26] While Congress apparently sought to borrow certain concepts from the APA, such as the prejudicial error rule, *see* S. Rep. No. 100-418, at 60-61, there is no reason to believe that Congress wanted any particular burden scheme to be imported into this very different statutory context. *See supra* Part II.A.

Nor does the similarity of the language require that the burden be allocated in the same way in these different contexts. The statutory language does not address burdens, and, as this Court has held, the same language may have different meanings in different statutes, depending on context. *See District of Columbia* v. *Carter*, 409 U.S. 418, 420-421 (1973); *see also General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596-597 (2004) ("[s]tatutory language must be read in context"; declining to hold that the word "age" had the same meaning throughout a statute (internal quotations omitted)). For all the reasons outlined in Part I above, the context of the veterans claims system calls for the allocation of the burden to the VA when the agency fails to provide VCAA notice.

---

[25] *See, e.g.*, 38 U.S.C. § 501(d).

[26] *See* S. Rep. No. 100-418, at 37 (explaining Congress's decision to create a separate statutory structure for VA review rather than repealing Section 211(a)); *id.* at 59 ("judicial review of VA decision[s] presents a unique situation in several respects" and "a central theme in drafting [the] legislation [was] to preserve those unique and desirable aspects [of the VA system] as much as possible while enhancing them by the addition of a right of judicial review").

The Government asserts that consistent interpretation is required because the APA was meant "to bring uniformity to a field full of variation and diversity." Pet. Br. 14 (quoting *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999)). But any desire for uniformity within the APA plainly cannot require extending APA principles to statutory schemes where Congress specifically decided *not* to apply the APA.

2. The Government incorrectly assumes the meaning of the APA provision

Even if there were a need for a consistent interpretation of the VJRA and the APA, the Government simply assumes the meaning of the APA provision. In the 60 years since the enactment of the APA, however, this Court has never confronted the question of which party bears the burden of proof under the APA rule of prejudicial error. Just last Term, for example, in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007), the Court cited the APA rule of prejudicial error in finding the error at issue harmless, but did not address which party was required to prove or disprove prejudice. Furthermore, as a matter of statutory interpretation, the proper burden assignment under the APA rule of prejudicial error is far from clear.

The APA rule of prejudicial error states that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. The statute does not define the provision, though the statutory reference to "the rule" suggests that Congress was referring to a pre-existing concept. *Cf.* Pet. Br. 12 (arguing that Congress's use of the word "the" in the VJRA shows its "refer[ence] to a particular existing rule that was established and defined at the time the statute was enacted"). The Attor-

ney General's Manual on the Administrative Procedure Act[27] stated that the APA's prejudicial error rule "sums up in succinct fashion the 'harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies, namely, that errors which have no substantial bearing on the ultimate rights of the parties will be disregarded." *Attorney General's Manual on the Administrative Procedure Act* 110 (1947).[28] At the time the APA was enacted, harmless error in the federal system was governed by a harmless error statute, 28 U.S.C. § 391, which Congress had passed in 1919.[29] This harmless error statute varied the allocation of the burden depending on the type of error at issue.[30]

---

[27] This Court has looked to the Attorney General's Manual for guidance when interpreting the APA. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

[28] *See also Administrative Procedure Act Legislative History*, Sen. Doc. 79-248, at 415 (1946) (Congress drafted the APA's judicial review provisions to restate existing law "as expounded in various statutes and as interpreted by the Supreme Court" (reprinting remarks of Rep. Hobbs, in turn reprinting a Department of Justice memorandum)).

[29] That statute provided that "in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181.

[30] In the case of technical errors, the 1919 statute "cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights." H.R. Rep. No. 65-913, at 1 (1919). By contrast, for non-technical errors, i.e., any "error ... of such a character that its natural effect is to prejudice a litigant's substantial rights," the

In *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), this Court applied the harmless error statute to a technical error in a civil case.[31] The Court explained that "[m]ere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court." *Id.* at 116 (quoting 28 U.S.C. § 391). For such technical errors, the party "who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Id.* This Court later made clear that the language in *Palmer* placing the burden on the party asserting error, "in context, referred to what the preceding sentence in *Palmer* described as '[m]ere "technical errors."'" *O'Neal* v. *McAninch*, 513 U.S. 432, 439 (1995) (alteration in original).

Three years later, in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), the Court again confirmed that technical errors "are to be disregarded" unless "the party seeking a new trial [meets] the burden of showing that any technical errors that he may complain of have affected his substantial rights." *Id.* at 760 (quoting H.R. Rep. No. 65-913, at 1 (1919)). The Court made special effort to note, however, "that this burden does not extend to all errors." *Id.* For an error "of such a character that its natural effect is to prejudice a liti-

---

burden would remain on the party who sought to defend the verdict. *Id.*

[31] The error at issue was a ruling that a witness statement given to the respondent's attorney would be placed in evidence if the petitioners' attorney reviewed it. *Palmer*, 318 U.S. at 116. The petitioners' attorney chose not to review the statement, objected, and later contended that the ruling was reversible error. *Id.*

gant's substantial rights," the burden of proving harmlessness rests on the party seeking to excuse the error. *Id.* (quoting H.R. Rep. No. 65-913, at 1). Drawing on legislative history, the Court set out the clear rule that "whether the burden of establishing that the error affected substantial rights or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is 'technical' or is such that 'its natural effect is to prejudice a litigant's substantial rights.' " *Id.* at 765 (quoting H.R. Rep. No. 65-913, at 1).[32]

Thus, despite the fact that the Government assumes that the APA rule invariably places the burden on the party claiming error, that conclusion is hardly free from doubt. The backdrop provided by the 1919 harmless error statute suggests the burden allocation varies depending on the nature of the error.

The Government, ignoring these first principles of statutory interpretation, offers as support for its view of the APA a set of court of appeals decisions (including many post-dating 1988). These opinions, however, are

---

[32] The Court also distinguished between technical and substantial error in administrative contexts. *Compare Market St. Ry. Co.* v. *Railroad Comm'n of State of Cal.*, 324 U.S. 548, 562 (1945) ("incidental reference" to evidence outside the record was not cause for reversal on due process grounds "in the absence of any showing of error or prejudice"; "due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties"), *with Simmons* v. *United States*, 348 U.S. 397, 406 (1955) (because the Government's failure to comply with a particular statutory procedure was "not an incidental infringement of technical rights," the party claiming error "need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to claim of the deprivation").

largely devoid of any reasoning regarding which party should properly bear the burden of proving prejudice. And, in any event, these cases do not provide support for the Government's sweeping rule.

Many of the court of appeals decisions cited by the Government—covering five circuits—derive from this Court's decision in *Palmer*. For example, in *Seine*, 374 F.2d at 981, the Ninth Circuit stated that "minor and insubstantial" administrative errors would not require reversal. It then announced its burden rule by directly quoting *Palmer*. *Id.*; *see also id.* at 982 (quoting *Palmer*). As noted, this Court has made clear that the language from *Palmer* quoted by the Ninth Circuit, which places the burden on the party asserting error, "in context, referred to what the preceding sentence in *Palmer* described as '[m]ere "technical errors."'" *O'Neal*, 513 U.S. at 439 (alteration in original).[33] Thus, consistent with *Palmer*, *Seine* can be read as placing the burden of proving prejudice on the challenger only with respect to technical errors.[34] The decisions of four other circuits cited by the Government can also be traced, directly or indirectly, back to *Palmer*.[35]

---

[33] *See also id.* at 439-440 ("[I]f the error is not 'technical,' ... '[then] the burden of sustaining a verdict will ... rest upon the one who claims under it.'" (quoting *Kotteakos*, 328 U.S. at 760)).

[34] For the same reason, if the reference to *Seine* in the VJRA legislative history, S. Rep. No. 100-418, at 61, is read to incorporate the entire case rather than the quoted portion, *but see supra* Part II.A, it should be understood to place the burden on the party claiming error only when technical errors are at issue.

[35] *See Air Canada* v. *Department of Trans.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998) (incorporating burden rule from line of civil cases leading back to *Palmer*); *Campanale & Sons, Inc.* v. *Evans*,

More generally, the cases cited by the Government do not support its effort to demonstrate a settled and uniform rule. In four of the cases cited, the court either found no error or left unanswered whether there was error.[36] In another three, the court did not clearly decide which party has the burden of proof.[37] Other cases involved technical errors[38] or allegations of agency delay (rather than error in the typical sense).[39] And in one case, the Government cites a dissenting opinion, in which the dissenting judge argued that the agency had not erred and only discussed the prejudicial error rule

---

311 F.3d 109, 127 (1st Cir. 2002) (Lynch, J., dissenting) (incorporating burden rule from *Air Canada* and line of civil cases leading back to *Palmer*); *see also Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999) (deriving burden rule from *Air Canada*); *American Airlines, Inc.* v. *Department of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) (deriving burden rule from *Friends of Iwo Jima*).

[36] *See American Airlines*, 202 F.3d at 797 (finding no error); *Air Canada*, 148 F.3d at 1156 (expressing skepticism over whether agency erred, but finding no prejudice "even if" agency erred); *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (plaintiffs failed to establish error, but "[e]ven if" agency erred, plaintiffs failed to establish prejudice); *Beef Nebraska*, 807 F.2d at 714 n.1 ("[e]ven if" agency erred, petitioner failed to show prejudice).

[37] *See Kroger Co.* v. *Regional Airport Auth.*, 286 F.3d 382, 389 (6th Cir. 2002); *Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 396 (Fed. Cir. 1996); *City of Frankfort*, 678 F.2d at 708.

[38] *Friends of Iwo Jima*, 176 F.3d at 774 (party claiming error failed to show that outcome would have differed "had notice been at its meticulous best"); *City of Frankfort*, 678 F.2d at 708 (involving "alleged technical deficiency" in the FERC's use of the word "affirm" rather than "adopt").

[39] *See City of Camden*, 831 F.2d at 451.

because it might "be of assistance on remand." *Campanale & Sons*, 311 F.3d at 126 (Lynch, J., dissenting).

Finally, by contrast to the cases the Government cites, court of appeals cases from the D.C. Circuit, the Fifth Circuit, and the Ninth Circuit relieve the party claiming error from proving prejudice in certain contexts. *See, e.g., Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 96 (noting the court's past use of the standard whereby "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure" and finding that Section 553 "would be eviscerated" and "virtually repeal[ed]" if the agency could skip the APA's notice-and-comment procedures with impunity unless the challenger could show prejudice).[40]

Thus, in addition to failing to provide reasoning to inform this Court's analysis, the cases cited by the Government do not support its contention that there is a clear and settled rule under the APA that should guide the allocation of the burden under the VJRA prejudicial error rule.

---

[40] *See also City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004) (describing application of APA harmless error rule, including placement of burden, as "depending on both the types of action and error at issue"); *Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (in applying APA's harmless error rule, "our precedent dictates that the agency must demonstrate that its error on the controlling regulation was harmless"); *Sprint Corp.* v. *FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (noting that "a showing of actual prejudice is not required under the prejudicial error rule"); *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (failing to find that prejudice was "clearly absent").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SEAN A. RAVIN
2800 Quebec St. NW
Washington, DC 20008
(202) 607-5731

CHRISTOPHER J. MEADE
Counsel of Record
ANNE K. SMALL
MEGAN BARBERO
MATTHEW T. JONES
CATHERINE M. RAHM
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

OCTOBER 2008

RESPONDENT'S BRIEF

108

No. 07-1209

Supreme Court, U.S.
FILED
OCT 14 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS,

Petitioner,

v.

WOODROW F. SANDERS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONDENT'S BRIEF FOR WOODROW F. SANDERS

MICHAEL A. MORIN
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Ave., NW
Washington, DC 20001-4413
(202) 408-4146

MARK R. LIPPMAN
(Counsel of Record)
THE VETERANS LAW GROUP
8070 La Jolla Shores Drive
#437
La Jolla, CA 92037
(858) 456-5840

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, at the Court of Appeals for Veterans Claims, claimants seeking disability benefits in the uniquely paternalistic Veterans Benefits Adjudication System should bear the burden of persuasion to establish the prejudicial effect of a notice error required by 38 U.S.C. § 5103(a).

TABLE OF CONTENTS

Page

Table of Authorities iv

Statutory Provisions Involved..... 1

Statement 1

Summary Of Argument..... 10

Argument..... 13

I. The Respondent Has The Burden To Establish The NonPrejudicial Effect Of A NonTechnical Error 13

(a) The Federal Common-Law Rule Of Harmless Error Cast The Burden Of Persuasion On Respondents 18

(b) With One Exception, The Original Harmless Error Statute Has Been Consistently Interpreted By The Court To Place The Burden Of Persuasion On Respondents..... 19

(c) The *Palmer* Decision Is Not Contrary To Controlling Supreme Court Authority Placing The Burden Of Persuasion On The Respondent..... 26

(d) While Decisions Of The Courts Of Appeals Are Divided On The Allocation Of The Burden Of Persuasion, Supreme Court Authority Controls The Interpretation Of The Original Harmless Error Statute 30

TABLE OF CONTENTS – Continued

Page

II. The Due Account Clause Of 38 U.S.C. § 7261(b)(2) And The Unique Mechanics Of The VCAA Notice Regime Require That The Burden Of Persuasion Fall On The Respondent/Agency 32

III. Notice Under 38 U.S.C. § 5103(a) Is A Substantial Right, A Violation Of Which Gives Rise To Presumed Prejudice; The Federal Circuit's Calculus For Prejudicial Error Allows The Government To Establish Harmless Error Without Resorting To Extra-Record Evidence 50

Conclusion 57

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Aetna Cas. and Sur. Co. v. Gosdin, 803 F.2d 1153 (11th Cir. 1986) 41

Agyeman v. I.N.S., 296 F.3d 871 (9th Cir. 2002) 33

Albernaz v. U.S., 450 U.S. 333 (1981) 32

Ali v. Federal Bureau of Prisons, ___ U.S. ___, 128 S.Ct. 831 (2008) 34

Allen v. Minnstar, Inc., 97 F.3d 1365 (10th Cir. 1996) 30

Andrews v. Nicholson, 421 F.3d 1278 (Fed. Cir. 2005) 36

Arizona v. Fulminante, 499 U.S. 279 (1991) 40

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 21

Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (en banc) 37

Barrett v. Nicholson, 466 F.3d 1038 (Fed. Cir. 2006) 50

Bell v. Derwinski, 2 Vet. App. 611 (1992) 47

Berger v. United States, 295 U.S. 78 (1935) 24

Bihn v. United States, 328 U.S. 633 (1946) 11, 22, 24, 25

Bloom v. West, 12 Vet. App. 185 (1999) 48

Bonhomme v. Nicholson, 21 Vet. App. 40 (2007) 46

Boone v. Lightner, 319 U.S. 561 (1943) 35

TABLE OF AUTHORITIES – Continued

Page

Boston & A. R. Co. v. O'Reilly, 158 U.S. 334 (1895) 19

Braniff Airways, Inc. v. C. A. B., 379 F.2d 453 (D.C. Cir. 1967) 14, 16

Brecht v. Abrahamson, 507 U.S. 619 (1993) 20, 22, 29

Brown v. Gardner, 513 U.S. 115 (1994) 12

Brown v. Speller, et al., 344 U.S. 443 (1953) 24

Bruno v. United States, 308 U.S. 287 (1939) 23

Camp v. Pitts, 411 U.S. 138 (1973) 45

Chapman v. Cal., 386 U.S. 18 (1967) 18

Charter v. Chleborad, 551 F.2d 246 (8th Cir. 1977) 41

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 43, 45

Conway v. Chem. Leaman Tank Lines, 525 F.2d 927 (5th Cir. 1976) 31

Cornelius v. Nutt, 472 U.S. 648 (1985) 16

Crawford v. U.S., 212 U.S. 183 (1909) 19

Cubic Applications, Inc. v. United States, 37 Fed. Cl. 345 (1997) 46

Dalton v. Nicholson, 21 Vet. App. 23 (2007) 57

Daniels v. Brown, 9 Vet. App. 348 (1996) 42

Deery v. Cray, 72 U.S. 795 (1866) 18, 19

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 41

Dickinson v. Zurko, 527 U.S. 150 (1999) 15

TABLE OF AUTHORITIES – Continued

Page

Dir., Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994) 17

Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998) 16

Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919) 19, 23

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) 35, 38

Forshey v. Principi, 284 F.3d 1335 (Fed. Cir. 2002) (en banc) 39

George-Harvey v. Nicholson, 21 Vet. App. 334 (2007) 57

Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004) 14

Gilbert v. Derwinski, 1 Vet. App. 49 (1990) 12

Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) 33

Greenlaw v. United States, 128 S.Ct. 2559 (2008) 40

Hensley v. West, 212 F.3d 1255 (Fed. Cir. 2000) 46

Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998) 12

Hormel v. Helvering, 312 U.S. 552 (1941) 40

In Re Frank Fehr Brewing Co., 268 F.2d 170 (6th Cir. 1959) 46

TABLE OF AUTHORITIES – Continued

Page

Ind. Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U.S. 268 (1934) 25

Jaquay v. Principi, 304 F.3d 1276 (Fed. Cir. 2002) (en banc) 1

Jordan v. Medley, 711 F.2d 211 (D.C. Cir. 1983) 14, 31, 52

Kerner v. Celebreeze, 340 F.2d 736 (2nd Cir. 1965) 17

Kotteakos v. United States, 328 U.S. 750 (1946) ... *passim*

Littke v. Derwinski, 1 Vet. App. 90 (1990) 1

Livesay v. Principi, 15 Vet. App. 165 (2001) 3

Locklear v. Nicholson, 20 Vet. App. 410 (2006) 2, 51

Lusby v. T.G. & Y. Stores, Inc., 796 F.2d 1307 (10th Cir. 1986) 31

Manio v. Derwinski, 1 Vet. App. 140 (1991) 39

Marsh v. West, 11 Vet. App. 468 (1998) 42

Mass. Trs. of E. Gas & Fuel Ass'ns v. United States, 377 U.S. 235 (1964) 13, 14

Mayfield v. Nicholson, 19 Vet. App. 103 (2005) 5, 9, 49, 54

Mayfield v. Nicholson, 444 F.3d 1328 (Fed. Cir. 2006) 5, 54

McCandless v. United States, 298 U.S. 342 (1936) 11, 24, 25, 52

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 22

TABLE OF AUTHORITIES – Continued

Page

McGee v. Peake, 511 F.3d 1352 (Fed. Cir. 2008) 38

McKnight v. Gober, 131 F.3d 1483 (Fed. Cir. 1997) 3

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 49

McQueeney v. Wilmington Trust Co., 779 F.2d 916 (3rd Cir. 1985) 31

Medrano v. Nicholson, 21 Vet. App. 165 (2007) 57

Mexia v. Oliver, 148 U.S. 664 (1893) 19

Mlechick v. Mansfield, 503 F.3d 1340 (Fed. Cir. 2007) 44

Moores v. Citizens' National Bank, 104 U.S. 625 (1881) 19

Murillo v. Brown, 8 Vet. App. 278 (1995) 46

Natural Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797 (9th Cir. 2005) 14

Nelson v. Swing-A-Way Mfg. Co., 266 F.2d 184 (8th Cir. 1959) 46

Nolen v. Gober, 222 F.3d 1356 (Fed. Cir. 2000) 39

Northcross v. Bd. of Ed. of Memphis City Sch., 412 U.S. 427 (1973) 10

Obrey v. Johnson, 400 F.3d 691 (9th Cir. 2005) 31

O'Neal v. McAninch, 513 U.S. 432 (1995) 11, 14, 26, 29

Overton v. Nicholson, 20 Vet. App. 427 (2006) 57

TABLE OF AUTHORITIES – Continued

Page

Palmer v. Hoffman, 318 U.S. 109 (1943) 26, 27, 28, 29, 30

Palor v. Nicholson, 21 Vet. App. 325 (2007) 57

Peck v. Heurich, 167 U.S. 624 (1897) 19

Pelegrini v. Principi, 18 Vet. App. 112 (2004) 42

Perez-Lastor v. I.N.S., 208 F.3d 773 (9th Cir. 2000) 33

Persinger v. Norfolk & W. Ry. Co., 920 F.2d 1185 (4th Cir. 1990) 31

Pond v. West, 12 Vet. App. 341 (1999) 7

Quartuccio v. Principi, 16 Vet. App. 183 (2002) 55

Rogozinski v. Derwinski, 1 Vet. App. 19 (1990) 44

Rucker v. Brown, 10 Vet. App. 67 (1997) 48

Russell v. Southard., 53 U.S. 139 (1851) 28

Schley v. Pullman's Palace Car Co., 120 U.S. 575 (1887) 45

Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000) 28

Sims v. Apfel, 530 U.S. 103 (2000) 37, 39

Sizemore v. Principi, 18 Vet. App. 264 (2004) 47

Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) 21

Smiths v. Shoemaker, 84 U.S. 630 (1873) 19

Stout v. Comm., Soc. Sec. Admin., 454 F.3d 1050 (9th Cir. 2006) 35

TABLE OF AUTHORITIES – Continued

Page

Taylor v. Va. Union Univ., 193 F.3d 219 (4th Cir. 1999) 31

Thurber v. Brown, 5 Vet. App. 119 (1993) 42

Turner v. Burnside, ___ F.3d ___ (11th Cir. 2008) (Case No. 07-14791) 46

U.S. v. Morgan, 307 U.S. 183 (1939) 37

U.S. Steel Corp. v. U.S. E.P.A., 595 F.2d 207 (5th Cir. 1979) 14

United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963) 45

United States v. Olano, 507 U.S. 725 (1993) 21, 24

United States v. River Rouge Improvement Co., 269 U.S. 411 (1926) 11, 23, 24

United States v. Sharpe, 470 U.S. 675 (1985) 28

United States v. Wells, 519 U.S. 482 (1997) 32

Vicksburg & M. R. Co. v. O'Brien, 119 U.S. 99 (1886) 19

Warner Bros. Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120 (2nd Cir. 1989) 45

Washington v. Nicholson, 21 Vet. App. 191 (2007) ..... *passim*

Wells v. Principi, 326 F.3d 1381 (Fed. Cir. 2003) 54

Wilhoite v. West, 11 Vet. App. 251 (1998) (per curiam) 44

Williams v. Great S. Lumber Co., 277 U.S. 19 (1928) 24

TABLE OF AUTHORITIES – Continued

Page

Williams v. United States Elevator Co., 920 F.2d 1019 (D.C. Cir. 1990) 31

Yazoo & M.V.R. Co. v. Mullins, 249 U.S. 531 (1919) 19, 23

STATUTES, REGULATIONS, RULES & OTHER AUTHORITIES

5 U.S.C. § 704 16

5 U.S.C. § 706 ..... *passim*

5 U.S.C. § 706(F) 43

5 U.S.C. § 7701(c)(2)(A) 16

28 U.S.C. § 391 ..... *passim*

28 U.S.C. § 2111 ..... *passim*

38 U.S.C. § 7 1

38 U.S.C. § 5100-5107 ..... *passim*

38 U.S.C. § 5103(a) ..... *passim*

38 U.S.C. § 5103A 51, 54

38 U.S.C. § 5103A(b) 38

38 U.S.C. § 5103A(c) 38, 47

38 U.S.C. § 5103A(d) 38

38 U.S.C. § 5104 55

38 U.S.C. § 5104(b) 53

38 U.S.C. § 5109A 3

38 U.S.C. § 7105 55

38 U.S.C. § 7105(d)(1) 53

TABLE OF AUTHORITIES – Continued

Page

38 U.S.C. § 7111 3
38 U.S.C. § 7126(b)(2) 11
38 U.S.C. § 7252(b) 1, 12, 43, 44
38 U.S.C. § 7261(a) 1
38 U.S.C. § 7261(a)(1) 34
38 U.S.C. § 7261(b) 1, 12, 44
38 U.S.C. § 7261(b)(1) 34, 43
38 U.S.C. § 7261(b)(2) ..... *passim*
38 U.S.C. § 7292(c) 34
38 U.S.C. § 7292(d)(2) 34
38 C.F.R. § 3.103(c)(2) 38
38 C.F.R. § 3.159(a)(1) 48
38 C.F.R. § 3.159(b)(1) 3
38 C.F.R. § 3.159(c) 47
38 C.F.R. § 3.303(a) 7
38 C.F.R. § 3.303(d) 7
Fed. R. Civ. P. 26(b) 27
Fed. R. Civ. P. 34 27
Fed. R. Civ. P. 51 17
Fed. R. Civ. P. 61 ..... 17, 20
Fed. R. Crim. P. 52 21
Fed. R. Crim. P. 52(a) 17, 20, 21, 24
Fed. R. Crim. P. 52(b) 21

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Evid. 103 28

Fed. R. Evid. 103(a) 20

Vet. App. R. 11(a) 44

Vet. App. R. 11(b)(1) 44

S. REP. NO. 79-758 (1945) 15

H.R. REP. NO. 79-1980 (1946) 15

H.R. REP. NO. 65-913 (3d Sess. 1919) 29, 30

H.R. REP. NO. 100-963 (1988) 1

9th Judicial Conference of the United States Court of Appeals for the Veterans Claims, (April 24 and 25, 2006), *reprinted* at 21 Vet. App. CLXXXI 51

Attorney General's Manual on the Administrative Procedure Act 110 (1947) App. to Attorney General's Statement regarding Revised Committee Report of October 5, 1945 ..... 15, 16

VA General Counsel Prec. 1-85 (March 5, 1985) 7

VA General Counsel Prec. 82-90 (July 18, 1990) 7

TREATISES

Black's Law Dictionary 1598 (6th ed. 1990) 53

Dorland's Illustrated Medical Dictionary 324 (28th ed. 1994) 5

3 Am. Jur., Appeal & Error § 926 (1936) 16

1 Wigmore, Evidence (3rd ed. 1940) 18

TABLE OF AUTHORITIES – Continued

Page

1 Wigmore, Evidence § 20a (Tillers rev. 1983) 45

C. Robert Luthman, *Conway v. Principi, Mayfield v. Nicholson, and (Re?) Defining the Harmless Error Doctrine in Light of the Veterans Claims Assistance Act of 2000*, 16 Fed. Cir. B.J. 509 (2007) 17

Barton F. Stichman & Ronald B. Abrams eds., *Veterans Benefits Manual* (2006 ed.)....3, 7, 47, 48, 49

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are: 5 U.S.C. § 706; 28 U.S.C. § 391 (1919); 38 U.S.C. § 5103(a); 38 U.S.C. § 7252(b) and 38 U.S.C. § 7261(a), (b). *See* Respondent App., *infra*, 1 (setting forth the entire text of 28 U.S.C. § 391 (1919) and 38 U.S.C. § 7252(b)).

STATEMENT

1. The Veterans Benefits Adjudication System divides into two basic functions: the development and adjudication[1] of claims. Under its inquisitorial model, the Department of Veterans Affairs ("the VA", "the Agency" or "the Secretary") has a duty to develop the record for claimants: namely, the duty to retrieve and produce relevant evidence. H.R. REP. NO. 100-963, at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795 ("I[m]plicit in such a beneficial system has been an evolution of a completely ex parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits."); *Littke v.*

[1] VA adjudication takes place on two levels: the first occurs at one of the many local regional offices, and if dissatisfied with the regional office decision, the claimant may appeal to the United States Board of Veterans' Appeals for a decision. *See Jaquay v. Principi*, 304 F.3d 1276, 1280-82 (Fed. Cir. 2002) (en banc) (providing overview of the various stages of VA adjudication).

Derwinski, 1 Vet. App. 90, 91 (1990) ("The VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial. An integral part of this system is embodied in the VA's duty to assist the veteran in developing the facts pertinent to his or her claim.").

To improve the development process, Congress enacted a comprehensive statutory scheme in November of 2000, known as the Veterans Claims Assistance Act (VCAA). Pub.L. No. 106-475, § 3, 114 Stat. 2096 (codified at 38 U.S.C. §§ 5100-5107 (2000)). Section 3(a) of the VCAA, which amended 38 U.S.C. § 5103(a), provides:

> Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary . . . will attempt to obtain on behalf of the claimant.

The VCAA notice regime turned record development into a more collaborative process, inspiring claimants to be active partners with the VA in evidence collection and production. *Locklear v. Nicholson*, 20 Vet. App. 410, 414 (2006) ("the duty to notify was designed by Congress with one purpose in mind –

to facilitate and maximize the collaborative process that is the cornerstone of the VA claims process"); Barton F. Stichman & Ronald B. Abrams, eds., *Veterans Benefits Manual* § 16.6.6.1, at 1337 (2006 ed.) ("The duty to notify provided for in the amended 38 U.S.C. § 5103(a) may be the most significant change in law to come about since the Veterans Judicial Review Act was passed in 1988 . . . ").

Prior to the enactment of the VCAA, claimants were permitted, but not systematically advised, to participate in evidentiary development. Former § 5103(a), for example, only obligated the VA to inform claimants to secure evidence in very limited situations. *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (holding that once the VA is put on notice of specific relevant evidence, the VA has a duty to inform the veteran to obtain this evidence).

The VCAA, on the other hand, mandates a litany of notifications for virtually every type of disability claim.[2] Section 5103(a), with its complementary regulation, 38 C.F.R. § 3.159(b)(1), breaks down into four parts (referred to as notice elements 1-4):

> (1) notice of what information or evidence is necessary to substantiate the claim; (2) notice of what subset of the necessary"

---

[2] *See Livesay v. Principi*, 15 Vet. App. 165, 178-79 (2001) (holding that provisions of VCAA do not apply to claims seeking a revision of a final Agency determination pursuant to 38 U.S.C. §§ 5109A and 7111).

> information of information or evidence, if any, that the claimant is [obligated] to provide; (3) notice of what subset of the necessary information or evidence, if any, that the VA will attempt to obtain; and (4) a general notification that the claimant may submit any other evidence he or she has in his or her possession that may be relevant to the claim.

(App.[3] at 9a.)

By this notice scheme, the Agency educates disabled veterans on what is needed to prevail in their claims, and prompts them to procure *existing* evidence and to produce *new* evidence, if necessary, to substantiate their claims.

> It is undisputed that section 5103(a) was enacted to in order that VA would "early in the claim process" let VA claimants know "what was necessary to substantiate their claims", (citations omitted), "so that the claimant[s] and/or VA can produce" the "information needed to substantiate their claims" that is "missing". . . . In this manner, section 5103(a) assumes a fundamental role in furthering an interest that goes to the very essence of the non-adversarial, pro-claimant nature of the VA adjudication system, . . . – that is, VA's duty to assist claimants in the development of their claims – by affording a claimant a meaningful opportunity to participate

---

[3] "App." refers to the Appendix attached to the Petitioner's petition for a writ of certiorari.

> effectively in the processing of his or her claim. (internal citations omitted).

Mayfield v. Nicholson ("*Mayfield I*"), 19 Vet. App. 103, 120-21 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

2. Respondent Woodrow F. Sanders, a veteran of World War II, served in the U.S. Army from May 1942 to September 1945. (App. at 25a.) He reports that in September 1944, while fighting the enemy in Germany, a bazooka exploded on the right side of his face, burning his eyebrows and facial hair. (*Id.* at 25a-26a.) Respondent claims that, six months after discharge, he began losing his sight in the right eye. (*Id.* at 45a.)

In December of 1948, Respondent was hospitalized for treatment and examination of his right eye. The admission examination report indicated that Respondent had severe macular chorioretinitis[4] of the right eye, with blindness in the central visual field. The hospital's final diagnosis was chronic right choroidoretinis (hereafter "chorioretinitis"), cause undetermined. (*Id.* at 44a-45a.)

In December 1992, VA physician, Joseph Ruda, M.D., Chief of Ophthalmology, prepared a written opinion on Respondent's behalf. After examining

---

[4] *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 324 (28th ed. 1994) (defines chorioretinitus as an inflation of the choroid and retina).

Respondent and taking the history of the in-service explosion into account, Dr. Ruda opined:

> It is not inconceivable that these macular and retinal lesions in each fundi and particular the right could have occurred secondary to trauma.

(*Id.* at 26a.)

In September 1993, private ophthalmologist Gregory A. Strainer, M.D., prepared a written opinion. Dr. Strainer concluded:

> This type of macular injury in [Respondent's] right eye can certainly be concussive in character and his history supports the visual acuity loss from his injury in World War II.

(*Id.* at 27a.)

In December 2000, Respondent underwent a VA eye examination by Sheila F. Anderson, M.D., Chief of Optometry. Dr. Anderson found it difficult to offer an etiological opinion based upon the available medical records:

> It is certainly possible for there to have been damage to the retina in 1944 that then hemorrhaged in 1948, as hemorrhages were noticed at that visit, but there are no other signs of ocular trauma. The chorioretinitis is most likely infections in nature, although the etiology at this point is impossible to determine. It is also possible that the patient contracted some infection while

> in the service that caused the chorioretinitis, but there is no way to prove this either. Based on the documented records, the patient did not lose vision *while*[5] on active duty.

(*Id.* at 29a) (italics added).

In August 2001, Respondent underwent another VA eye examination. Ophthalmologist Duane Y. Nii, M.D. could only surmise on the cause of his right eye condition:

> [Respondent's] decreased vision in the right eye is consistent with his clinical findings. The etiology of the patient's macular scar is more difficult to ascertain. If the patient's vision had been normal in the right eye prior to the reported injury, then it is possible that the macular scar could be related to the

---

[5] A claim for service-connected disability benefits may be granted on either a causal or temporal theory of service-connection. 38 C.F.R. § 3.303(a), (d). Most claims are based upon a causal theory of service-connection, requiring proof of three elements: 1) an in-service incurrence of an original disability or in-service aggravation of pre-existing (pre-service) disability, 2) a present disability, and 3) a relationship or nexus between present disability and the alleged in-service incurrence or aggravation. *See Pond v. West*, 12 Vet. App. 341, 346 (1999). For certain listed diseases meeting specified criteria, the VA presumes a nexus between present disability and service. *See Veterans Benefits Manuals*, § 3.4.5 at 115-27. For claims predicated on a theory of temporal service connection, the claimant must show: 1) initial manifestation of symptoms of the disease or condition in service and, 2) present disability of the same disease or condition. *See VA Gen. Couns., Prec. 82-90* (July 18, 1990) (originally issued as *VA Gen. Couns., Prec. 1-85* (Mar. 5, 1985)).

> injury as [Respondent] states. Due to the fact that [Respondent] does have the additional punched out chorioretinal scars in both eyes, the possibility of toxoplasmosis as the etiology of the macular scar could also be entertained.

(*Id.* at 30a.)

3. Following its denial of Respondent's claim to service-connected chorioretinitis of the right eye, the local Regional Office sent a letter to Respondent on June 18, 2003. (JA[6] at 24-29.) Among other things, the correspondence advised Respondent of the general type of evidence needed to substantiate a claim for service-connected disability benefits. (*Id.* at 27-28.)

4. On October 1, 2003, the United States Board of Veterans' Appeals ("the Board") denied Respondent's claim to entitlement to service connection for chorioretinitis of the right eye. (App. at 42a.)

5. On August 25, 2005, the United States Court of Appeals for Veterans Claims ("the Veterans Court") affirmed the Board's denial of the right eye claim. There, Respondent argued that the VCAA notice was defective on two grounds: 1) the correspondence failed to advise Respondent who would be ultimately responsible for obtaining evidence necessary to substantiate his claim and, 2) the notice was untimely,

---

[6] "JA" denotes the Joint Appendix.

having been provided after the initial Regional Office decision. (*Id.* at 38a); *see Mayfield I*, 19 Vet. App. at 128.

Assuming notice violations under § 5103(a), the court held that Respondent failed to meet his burden of establishing prejudice under the framework of *Mayfield I*, 19 Vet. App. 103.[7] (App. at 37a-38a.)

6. On May 16, 2007, the United States Court of Appeals for the Federal Circuit ("the Federal Circuit") reversed and remanded the decision of the Veterans Court. The Federal Circuit observed that "[t]he requirement that a claimant demonstrate prejudice as a result of a VCAA notice error is at odds with the very purpose behind the passage of the VCAA." (*Id.* at 14a.) Overruling *Mayfield I*, *id.*, in part, the court reasoned that, with respect to all types of notice errors, placing the burden on claimants would effectively excuse the VA of its VCAA notice obligations:

> By presuming these notice errors were not prejudicial, the Veterans Court essentially excused the VA's failure to satisfy its statutory obligations – ones which Congress explicitly required in order to allow the claimant to effectively participate in the processing of his or her claim – without a

---

[7] *Mayfield I* held that claimants must bear the burden of establishing prejudice of VCAA notice violations, except for notice-1 errors. 19 Vet. App. at 122; *see supra* pp. 3-4.

> showing that the defect had not frustrated the very purpose of the notice.

(*Id.* at 18a.)

SUMMARY OF ARGUMENT

I. The two harmless error statutes in question, 5 U.S.C. § 706 of the Administrative Procedure Act ("APA") and 38 U.S.C. § 7261(b)(2) of the Veterans Judicial Review Act ("VJRA"), are written in virtually identical language. As such, the two provisions have presumptively parallel meaning and application. *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973); *see* Brief for the Petitioner ("BP") at 8-9.

Significantly, § 706, as does § 7261(b)(2), refers to a pre-existing rule of prejudicial error: "*the* rule of prejudicial error." (emphasis added); *accord* BP at 13. At the time of the APA's enactment in 1946, then-existing rule of prejudicial error was governed by 28 U.S.C. § 391 (1919) (currently 38 U.S.C. § 2111 (1949)). Before and after the passage of the APA, with one exception, this Court consistently interpreted § 391 as placing the burden of persuasion on the beneficiary of a nontechnical error (hereafter "the respondent[s]")[8] to establish the nonprejudicial effect of the

[8] In this context, the respondent will be written with the first letter being lower case. When referring to the party in this action, Respondent will be written with the first letter as upper case.

nonprejudicial effect of the error. *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926); *McCandless v. United States*, 298 U.S. 342, 347-48 (1936); *Bihn v. United States*, 328 U.S. 633, 638 (1946); *Kotteakos v. United States*, 328 U.S. 750, 760 (1946); and *O'Neal v. McAninch*, 513 U.S. 432, 439 (1995).

For this and other reasons, §§ 706 and 7126(b)(2) must be read to cast the burden of persuasion on the respondent.

II. Moreover, even if the general rule of prejudicial error were otherwise, the *due account* clause of § 7261(b)(2) and the *sui generis* VCAA notice requirements would nonetheless compel the respondent to bear the burden of persuasion for VCAA notice violations. In light of what results from a notice violation – an undeveloped record on appeal – judicial review only makes sense if the respondent/Agency bears the burden of establishing the nonprejudicial effect of a VCAA notice error.

III. Notice under § 5103(a) is unquestionably a substantial right. Nevertheless, Petitioner contends that a violation of this right should not give rise to a presumption of prejudice. Speculating that other VA procedures *might* cure the prejudice resulting from a VCAA notice failure, Petitioner forebodes that a rule of presumptive prejudice would create insurmountable proof problems for the VA, leading to an avalanche of unwarranted remands. But this dim prediction is exaggerated. In fact, several published

cases since the Federal Circuit's opinion demonstrate that the VA can successfully rebut the presumption of prejudice in many appropriate circumstances.

What is more, unlike Petitioner's proposed rule of presumed harmlessness, the Federal Circuit's calculus has the virtue of deciding all questions on the administrative record. Consistent with the statutory ban against consideration of extra-record evidence, 38 U.S.C. § 7252(b); 38 U.S.C. § 7261(b), the rule of presumed prejudice renders unnecessary after-the-fact proffers, declarations or other testimonials never submitted to the Agency.

In sum, the Federal Circuit's decision is not only consistent with the letter and spirit of the VCAA, but also gives the proper respect owed to the men and women who have served our Nation's armed forces. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimants.") (internal citations omitted); *see generally Gilbert v. Derwinski*, 1 Vet. App. 49, 54 (1990) ("This unique standard of proof is in keeping with the high esteem in which our nation holds those who have served in the Armed Service. . . . By tradition and by statute, the benefit of the doubt belongs to the veteran."). To the extent there is any doubt in the interpretation of § 7261(b)(2), "that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (internal citation omitted).

ARGUMENT

I. THE RESPONDENT HAS THE BURDEN TO ESTABLISH THE NONPREJUDICIAL EFFECT OF A NONTECHNICAL ERROR

Petitioner argues that the language and legislative history of 38 U.S.C. § 7261(b)(2)[9] establish that "Congress intended to adopt the same rule of prejudicial error as that applied under the APA [5 U.S.C. § 706[10]]." BP at 11. This same rule of prejudicial error, Petitioner asserts, places the burden of persuasion on the party asserting the error (hereafter "the appellant[s]") to establish the prejudice of the error. BP at 15-17.

For this proposition, Petitioner relies upon the purported "uniform[11] view of the federal [circuit]

---

[9] Under § 7261(b)(2), the Veterans Court "shall take due account of the rule of prejudicial error."

[10] Section 706 states "due account shall be taken of the rule of prejudicial error."

[11] Petitioner's characterization of the case law interpreting § 706 as "uniform" is inaccurate. On the burden of persuasion issue, the most analogous Supreme Court decision is *Mass. Trs. of E. Gas & Fuel Ass'ns v. United States*, 377 U.S. 235 (1964). There, in refusing to remand an agency determination, the Court broadly stated the test for harmless error:

> In light of these factors we find inapposite here cases refusing to validate an exercise of administrative discretion because it could have been supported by principles or facts not considered, or procedures not undertaken, by the responsible body. These cases are aimed at assuring that initial administrative determinations are made with relevant criteria in mind

(Continued on following page)

> and in a proper procedural manner; when a mistake of the administrative body is one that *clearly* had no bearing on the procedure used or the substance of decision reached, as in this instance (assuming there was such a mistake), the sought extension of the cases cited would not advance the purpose they were intended to serve.

Id. at 247-48 (emphasis added). By employing the word *clearly* in this context, the Court necessarily held that the respondent/beneficiary of the error would have the burden to persuade a reviewing court of the harmlessness of the error. For, if a court is uncertain on this question, the error must be deemed prejudicial. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) ("We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict"); *Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983) (J. Scalia) (noting that reviewing court must have "necessary assurance" that error did not affect the verdict otherwise error is deemed prejudicial); *Kotteakos*, 328 U.S. at 765 ("fair assurance" standard); *see also Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1071 (9th Cir. 2004) ("In circumstances where an agency errs, we may evaluate whether such an error was harmless. *See* 5 U.S.C. § 706. In applying harmless error analysis, our precedent dictates that the agency must demonstrate that its error on the controlling regulation was harmless."); *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 807 (9th Cir. 2005) ("The Forest Service [Agency] bears the burden of demonstrating harmlessness. (Citation omitted)."); *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 215 (5th Cir. 1979) ("Nor can the Agency rest on the doctrine of harmless error. While that doctrine has been held applicable to review of agency actions, and has statutory sanction in the APA, it is to be used only 'when a mistake of the administrative body is one that *clearly* had no bearing on the procedure used or the substance of decision reached.' . . . Here the Agency's error plainly affected the procedure used, and we cannot assume that there was no prejudice to petitioners. *Absence of such prejudice must be clear for harmless error to be applicable.*" (emphasis added); *Braniff*

(Continued on following page)

courts . . . that Section 706 'requires the party asserting error to demonstrate prejudice from the error.' (Citations omitted)." BP at 15.

Contrary to Petitioner's contention, 28 U.S.C. § 391 [current version at 38 U.S.C. § 2111] – the original federal harmless error statute – controls the interpretation of §§ 706 and 7261(b)(2). Both before and after the passage of the APA, the High Court consistently read this harmless error statute as placing the burden of persuasion on the respondent to establish the nonprejudicial effect of a nontechnical error.

The APA was a groundbreaking experiment for its day, designed to bring uniformity to the many diverse federal agencies. *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999). Among the APA's several provisions, § 706 instructs that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. This stark command leaves the term prejudicial error undefined, and the legislative history, to the extent it is relevant, is scanty and inconclusive.[12] With no clear statutory

---

Airways, Inc. v. C. A. B., 379 F.2d 453, 467 (D.C. Cir. 1967) (holding that in a "close case", Agency may not rely upon harmless error doctrine to affirm its decision).

[12] Some parts of the legislative history suggest Congress adopted the general common law of all state jurisdictions. S. REP. NO. 79-758, at 231 (1945); App. to Attorney General's Statement regarding Revised Committee Report of October 5, 1945, at 418. Other parts indicate that Congress intended the harmless error rule to apply when the error has been cured before the administrative decision. S. REP. NO. 79-758 (1945); H.R. REP. NO. 79-1980, at 280 (1946).

(Continued on following page)

directive, the most natural assumption is that Congress took the then-existing federal harmless error standard as its paradigm. *See Cornelius v. Nutt*, 472 U.S. 648, 657 n.9 (1985) (noting that Congress presumably intended the undefined term "harmful error" under 5 U.S.C. § 7701(c)(2)(A) to have its judicially-defined meaning); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998) ("[Section 706] 'sums up in succinct fashion the 'harmless error' rule applied by courts in the review of lower court decisions as well as of administrative bodies,' . . . The rule tempers judicial consideration of challenges to 'preliminary, procedural, or intermediate agency action,' 5 U.S.C. § 704, in much the same way the harmless error rule affects appellate review of other types of cases.") (citing United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 110 (1947), *reprinted in* Administrative Conference of the United States Federal Administrative Procedure Sourcebook 67, 176 (2d ed. 1992); *Braniff Airways, Inc.*, 379 F.2d at 465 ("Although the standards governing its application may differ, the 'harmless error' principle announced for our general jurisprudence by decision and statute (*e.g.*, 28 U.S.C. § 2111 (1964)) is

---

At the time of the passage of the APA, the prevailing rule of the common law in state jurisdictions was that errors were presumed prejudicial. 3 Am. Jur., "Appeal & Error," § 926 (1936) ("According to what seems to be the prevailing rule, the reviewing court will presume that such error was prejudicial unless the record shows the contrary.").

applicable to the review of the decisions of administrative agencies."); *Kerner v. Celebreeze*, 340 F.2d 736, 740 (2nd Cir. 1965) ("Although the harmless error statute, 28 U.S.C. § 2111, is not in terms applicable to review of administrative action, we perceive no reason why the salutary principle embodied in it should not be so applied, even when the error consists of a procedural irregularity under the APA as, indeed, § 10(e) of the APA contemplates."); (citation omitted); C. Robert Luthman, *Conway v. Principi, Mayfield v. Nicholson, and (Re?) Defining the Harmless Error Doctrine in Light of the Veterans Claims Assistance Act of 2000*, 16 Fed. Cir. B.J. 509, 515 (2007) ("While administrative law precedent does not flesh out the specific parameters of the harmless error doctrine, it is apparent that the doctrine, as it exists, draws on the harmless error rule in the civil and, to a certain extent, the criminal forums.").

Viewed from another perspective, just as the deliberate use of the article *the* in § 7261(b)(2) contemplates "a specific and previously defined rule for determining whether an error is prejudicial," BP at 13, so does the use of the same article in § 706. At the time of the APA's enactment in 1946, the only existing rule of prejudicial error was that governing criminal and civil appeals: 28 U.S.C. § 391 (1919) (current version at 38 U.S.C. § 2111 (1949)); *see also* Fed. R. Civ. P. 61 (1937); Fed. R. Civ. P. 51 (1937); Fed. R. Crim. P. 52(a) (1944). *See Dir., Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (interpreting undefined

term of the APA as following the definition generally accepted at the time of the enactment of the APA).

a) The Federal Common-Law Rule Of Harmless Error Cast The Burden Of Persuasion On Respondents

The rule of prejudicial error springs from the English common law. *Chapman v. Cal.*, 386 U.S. 18, 24 (1967) ("[T]he original common-law harmless-error rule put the burden [of persuasion] on the beneficiary of the error. . . ."; 1 Wigmore, Evidence 364 *et seq.* (3rd ed. 1940). American common law followed the English rule in both criminal and civil practice.

In *Deery v. Cray*, 72 U.S. 795 (1866), the Supreme Court announced what was to become the longstanding rule of harmless error review – that the respondent bears the burden of persuasion to establish the nonprejudicial effect of an error:

> We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But *whenever* the application of this rule is sought, *it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.*

(*Id.* at 807-08) (emphasis added).

The rule of *Deery* governed the common law for fifty years; when in 1919, Congress took up the question of harmless error. *See, e.g., Crawford v. U.S.*, 212 U.S. 183, 203 (1909); *Peck v. Heurich*, 167 U.S. 624, 629 (1897); *Boston & A. R. Co. v. O'Reilly*, 158 U.S. 334, 337 (1895); *Mexia v. Oliver*, 148 U.S. 664, 673 (1893); *Vicksburg & M. R. Co. v. O'Brien*, 119 U.S. 99, 103 (1886); *Moores v. Citizens' National Bank*, 104 U.S. 625, 629-30 (1881); *Smiths v. Shoemaker*, 84 U.S. 630, 639 (1873); *see also Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("[I]n jury trials erroneous rulings are *presumptively* injurious, . . . and they furnish ground for reversal unless it *affirmatively* appears that they were harmless." (emphasis added); *Yazoo & M.V.R. Co. v. Mullins*, 249 U.S. 531, 532-33 (1919) ("It is true generally in cases coming from lower federal courts that the rendering of an erroneous decision on a particular question, . . . or the assignment by the lower court of an erroneous reason for a right decision, will not entitle the complaining party to reversal, if it is *clear that his rights were not prejudiced thereby*," (emphasis added) (internal citations omitted).

b) The Original Harmless Error Statute Has Been Consistently Interpreted By This Court To Place The Burden Of Persuasion On Respondents

In 1919, Congress amended § 269 of the Judicial Code, 28 U.S.C. § 391 (repealed by the Judicial

Act of 1948), creating the original harmless error statute, and a template for other harmless error provisions.[13]

Section 391 read:

> All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment *after an examination of the entire record* before the court, *without regard to technical errors, defects, or exceptions* which do not affect the substantial rights of the parties.[14]

(emphasis added).

---

[13] Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"); Fed. R. Civ. P. 61 ("[T]he court must disregard all errors and defects that do not affect any party's substantial rights."); Fed. R. Evid. 103(a) ("Error may not be predicated upon a ruling . . . unless a substantial right of the party is affected").

[14] In 1949, section 391 was replaced by 38 U.S.C. § 2111, with no substantive changes made. *Brecht v. Abrahamson*, 507 U.S. 619, 631 n.7 (1993). In § 2111, Congress omitted the word "technical" and the words "criminal or civil", thereby affirming that harmless error review extended to "any case."

(Continued on following page)

Congress wrote this provision against the well-established common-law rule that errors are presumptively prejudicial. As such, Congress is presumed to have endorsed this presumption. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles", and common-law principles are read into legislation unless they contradict the legislative intent.).

More importantly, in drafting this amendment, Congress had the opportunity to change the ending phrase from a negative to an affirmative requirement: errors "which do *not* affect substantial rights . . . " § 2111 (emphasis added). At the time of the passage of § 2111 in 1949, Congress had recently enacted Rules 52(a) and (b) of the Federal Rules of Criminal Procedure, the harmless and plain error review provisions. Significantly, Congress couched these two complementary sections in negative and affirmative terms, respectively. Fed. R. Crim. P. 52(a) (1944) ("does *not* affect substantial rights") (emphasis added); Fed. R. Crim. P. 52(b) ("that affects substantial rights"). This linguistic difference set forth reciprocal allocations of the burden of persuasion. *United States v. Olano*, 507 U.S. 725, 734-35 (1993) ("This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights.' Rule 52(b) authorizes no remedy unless the error *does* 'affect substantial rights.'" (emphasis added). Presumably cognizant of the differing language of Rule 52 and its import, Congress nonetheless declined to make any changes to the critical wording of § 2111: that is, to frame the ending clause in affirmative terms, thereby allocating the burden of persuasion to appellants. *See generally Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Except for so-called *technical* errors, the common-law rule fit easily within the language and intent of § 391. *Kotteakos*, 328 U.S. at 760 ("[T]he bill in its final form was stated authoritatively to be 'to cast upon the party seeking a new trial the burden of showing that any *technical errors* that he may complain of have affected his substantial rights, otherwise they are to be disregarded. . . . The proposed legislation affects only *technical errors*.'") (emphasis added) (internal quotations omitted).

By its terms, the provision declared its twofold purpose: 1) to ensure that appellate courts are reflective and deliberate in deciding questions of prejudicial error *by examin[ing] the entire record*,[15] and 2) to make certain that reversals are based upon errors which might have influenced the proceedings, not upon trivial or *technical* defects. *Kotteakos*, 328 U.S. at 759-62; *see also McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) ("The harmless error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial . . . "); *Bihn v. United States*, 328 U.S. 633, 638 (1946) (interpreting the harmless error statute as preventing criminal appeals from

---

[15] *Brecht v. Abrahamson*, 507 U.S. 619, 641 (1993) (Stevens, J., concurring) ("Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record.").

becoming mere "quest[s] for error"); *Bruno v. United States*, 308 U.S. 287, 294 (1939) ("Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict.").

Citing *Yazoo* and *Fillippon*,[16] the High Court in *United States v. River Rouge Improvement Co.*, 269 U.S. 411 (1926) affirmed the survival of the common-law rule in the wake of § 391:

> The present case is not controlled by the provision of section 269 of the Judicial Code, as amended by the Act of February 26, 1919. . . . We need not enter upon a discussion of the divergent views which have been expressed in various Circuit Courts of Appeals as to the effect of the Act of 1919. It suffices to say that *since the passage of this Act, as well as before, an error which relates, not to merely formal or technical matters*, but to the substantial rights of the parties – especially when embodied in the charge to a jury – is to be held a ground for reversal, *unless it appears from the whole record that it was*

---

[16] *See supra* p. 19.

> *harmless and did not prejudice the rights of the complaining party . . .* [17]

Id. at 421 (emphasis added); *see also Williams v. Great S. Lumber Co.*, 277 U.S. 19, 26 (1928) (following *River Rouge*).

In *McCandless v. United States*, 298 U.S. 342 (1936), a civil suit, the Court followed this interpretation of § 391:

> In this situation, section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial . . .*

Id. at 347-48 (emphasis added); *see also Ind. Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U.S.

---

[17] By conditioning the application of harmless error upon an affirmative showing of harmlessness or lack of prejudice, the Court implicitly held that the burden of persuasion falls on the respondent. *See Olano*, 507 U.S. at 734 (observing that, by framing the error correction issue under Fed. R. Crim. P. 52(a) in terms of an affirmative showing of lack of prejudice, Congress intended to place the burden of proof on the government/respondent).

268, 281 (1934) ("Respondents had opportunity here to show that, although given on untenable grounds, the judgment below is right and should be affirmed. And, if by the record they could so demonstrate, this court, if satisfied beyond doubt that it could do so without prejudice to petitioner, properly might refrain from reversal.").

And later relying upon *McCandless*, the Court in *Bihn* interpreted § 391 as placing on the respondent the risk of doubt as to the prejudicial effect of non-technical, nontrivial errors:

> We certainly cannot say from a review of the whole record that *lack of prejudice affirmatively appears*. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. *Since the scales were quite evenly Balanced* [sic], we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a *minor aberration of trivial consequence*.

328 U.S. at 638 (emphasis added); *compare O'Neal v. McAninch*, 513 U.S. 432, 439 (1995) ("[I]f a judge is in grave doubt about the effect on the jury of this kind of error, the petitioner [respondent] must loose. . . . By 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.").

c) The *Palmer* Decision Is Not Contrary To The Controlling Line Of Supreme Court Authority Placing The Burden Of Persuasion On The Respondent

The only Supreme Court opinion in any possible tension with this settled construction of § 391 is *Palmer v. Hoffman*, 318 U.S. 109 (1943). But a close examination shows *Palmer* to be consistent with the controlling line of authority.

In *Palmer,* a witness for the respondent testified during cross-examination that he gave a signed statement to one of respondent's attorneys. *Id.* at 116. Petitioners' counsel asked to review the document, and the trial court ruled that, if counsel inspected the document, the statement would be admitted into evidence. Objecting to the ruling, petitioners' counsel declined to review the document. On review, petitioners failed to include this document in the record on appeal. *Id.*

Rejecting petitioners' appeal on this evidentiary issue, the Court explained:

> Petitioners contend that that ruling was reversible error in light of Rule 26(b) and Rule 34 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks

> which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 118, 28 U.S.C. § 391, 28 U.S.C.A. § 391. *He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.* That burden has not been maintained by petitioners.

Id. (emphasis added).

By any measure, the emphasized language cannot reasonably be read as a holding, imposing upon the appellant the burden of persuasion to establish the prejudice of *nontechnical* errors. To begin with, *Palmer* fails to cite, let alone discuss, the common-law rule or Supreme Court opinions interpreting section 391 in the same light. Thus, if this one sentence in *Palmer* were to constitute a broad holding applicable to all errors, technical and nontechnical alike, *Palmer* would be overruling *sub silentio* a long line of Supreme Court authority. *See generally Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."); *United States v. Sharpe*, 470 U.S. 675, 694 n.6 (1985) (Marshall, J., concurring) ("Legal reasoning hardly consists of finding isolated sentences in wholly different contexts and using them to overrule *sub silentio* prior holdings.").

As the facts make clear, the *ratio decidendi* of *Palmer* is limited to the longstanding proposition that a reviewing court may not consider matters outside of the record. *See Russell v. Southard*, 53 U.S. 139, 159 (1851) ("according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal"). And, as a consequence, if the evidence in question or an offer of proof of the same is not part of the appellate record, a reviewing court cannot evaluate the prejudicial effect of the loss of the would-be evidence. *Compare* Fed. R. Evid. 103, Advisory Committee Notes, 1972 Proposed Rules, Note to Subdivision (d) ("In the nature of things the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.").

Moreover, *Palmer* was decided before the enactment of 28 U.S.C. § 2111, replacing § 391. Among other subtle changes, § 2111 omitted the word "technical". With respect to § 391, the legislative history indicates that the statute was intended to place the burden of proof upon the appellant to establish prejudice of technical errors. H.R. REP. NO. 65-913, at 1 (3d Sess. 1919). By implication, the burden of persuasion for nontechnical errors was to be borne by the respondent. *Brecht*, 507 U.S. at 641 (Stevens, J., concurring) (reiterating that *Kotteakos* "plainly stated that unless an error is merely 'technical,' the burden

of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution.").

Thus, as this Court clarified in *O'Neal*, 513 U.S. at 439-40, *Palmer*'s language must be read in the context of the original harmless error statute, which unlike § 2111, spoke of "technical" errors:

> But this pre-*Kotteakos* language, in context, referred to what the preceding sentence in *Palmer* described as "[m]ere 'technical errors.'" 318 U.S., at 116, 63 S.Ct., at 482. *Kotteakos* itself makes clear that "technical errors" may be different. It quotes an excerpt from the House Report accompanying the harmless-error statute (then 28 U.S.C. § 391) that says the statute casts "'upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights.'" *Kotteakos*, 328 U.S., at 760, 66 S.Ct., at 1246 (quoting H.R.Rep. No. 913, 65th Cong., 3d Sess., 1 (1919)).
>
> The Report, however, (as *Kotteakos* immediately points out) goes on to say that if the error is not "technical," if, instead, "'the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, [then] the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it.'" H.R.Rep. No. 913, *supra*, at 1.

d) While Decisions Of The Courts Of Appeals Are Divided On The Allocation Of The Burden Of Persuasion, The Single Line Of Supreme Court Authority Controls The Interpretation Of The Original Harmless Error Statute

Following *Palmer*, the courts of appeals have split on the issue of who bears the burden of persuasion on harmless error review in civil cases. *Allen v. Minnstar, Inc.*, 97 F.3d 1365, 1374 (10th Cir. 1996) (Lucero, J., concurring) ("Our decision should not be read as holding that an appellant invariably carries a burden to disprove harmlessness. Such a reading needlessly enters the much conflicted body of jurisprudence regarding burdens or presumptions in harmless error analysis in civil cases.") (internal citations omitted). Several courts place the burden of persuasion on the respondent either explicitly[18] or implicitly;[19] whereas others impose the burden on the appellant. BP at 29-30.

---

[18] *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1312 n.4 (10th Cir. 1986); *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1189 (4th Cir. 1990); *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005) ("the harmless error standard we apply in civil cases must be consistent with the standard we apply to nonconstitutional errors in criminal cases: 'we must reverse . . . unless it is more probable than not that the error did not materially affect the verdict.' The party benefiting from the error has the burden of persuasion, and 'in cases of equipoise,' we reverse." (internal citations omitted).

[19] Several courts assume that the respondent bears the burden of persuasion, but disagree as to the applicable standard

(Continued on following page)

Be that as it may, this Court's formulation of the common-law rule and its interpretation of the original harmless error statute were clear and controlling at the time of the enactment of § 706 and § 7261(b)(2). It is against this backdrop that Congress wrote both harmless error measures. *United States v. Wells*, 519 U.S. 482, 495 (1997) (even though lower court opinions may be inconsistent with Supreme Court authority on the interpretation of statutory language, in subsequent enactments "Congress expects its statutes to be read in conformity with this Court's precedents"). In the final analysis, Congress is presumed to know and follow controlling precedent. *Albernaz v. U.S.*, 450 U.S. 333, 341 (1981) ("Congress is 'predominantly a lawyer's body,' (citation omitted)

---

of proof: *i.e.*, "more probable than not" or "highly probable" that the error was harmless. *Taylor v. Va. Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999); *id.* at 235 n.10 ("the statutory language of § 2111 implies that Congress intended uniform treatment of the harmless error statute in the civil and criminal contexts"); *Jordan v. Medley*, 711 F.2d at 219 n.6 ("the formulation of *Kotteakos* – if not the same application of that formulation – is used by this court and others to determine effect upon 'substantial rights' in civil cases"); *Williams v. United States Elevator Co.*, 920 F.2d 1019, 1023 (D.C. Cir. 1990) ("We are well aware that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case."); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 925-27 (3rd Cir. 1985) (holding that harmless error analysis in civil cases is the same as that in criminal cases); *Conway v. Chem. Leaman Tank Lines*, 525 F.2d 927, 929 n.3 (5th Cir. 1976) (holding that the *Kotteakos* standard applies to both civil and criminal appeals for harmless error).

and it is appropriate for us 'to assume that our elected representatives . . . know the law'. . . .").

II. THE DUE ACCOUNT CLAUSE OF § 7261(b)(2) AND THE UNIQUE MECHANICS OF THE VCAA NOTICE REGIME REQUIRE THAT THE BURDEN OF PERSUASION FALL ON THE RESPONDENT/AGENCY

Even if Petitioner were correct that the general rule for prejudicial error under §§ 706 and 7261(b)(2) casts the burden of persuasion on appellants/claimants to establish prejudice, the *due account* clause of § 7261(b)(2) and the unprecedented effect of VCAA notice failures would nevertheless compel the burden of persuasion to fall on the respondent/Agency.

Petitioner contends that the *due account* clause of § 7261(b)(2) arguably confers discretion upon the Veterans Court in deciding the applicability, but not the interpretation, of the prejudicial error rule: *i.e.*, *if*, but not *how*, the rule of prejudicial error operates. BP at 18.

Petitioner is incorrect on two fronts. First, in the unique context of VCAA notice errors, the *due account* clause must be read as requiring (not just conferring discretion upon) the Veterans Court to allocate the burden of persuasion to the Agency. In light of what results from a notice violation – an undeveloped

record on appeal[20] – the *due account* clause, indeed judicial review in general, only makes sense if interpreted as compelling the respondent/Agency to bear the burden of persuasion. *See generally Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-10 (1989) (noting plain language of a provision will not be interpreted literally if it would create an odd result). Namely, an odd result occurs if veterans denied or short-changed VCAA notice are then required to prove the prejudice of this error with an incomplete record caused by the VCAA error itself. *Cf. Agyeman v. I.N.S.*, 296 F.3d 871, 884-85 (9th Cir. 2002) ("We have held that prejudice may be shown where the [Immigration Judge's] inadequate explanation of the hearing procedures and failure to elicit pertinent facts prevented the alien from presenting evidence relevant to their claim.") (internal citation omitted); *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 782 (9th Cir. 2000) ("We cannot require Perez-Lastor to produce a record that does not exist" to prove prejudice.) (internal citation omitted).

Second, contrary to Petitioner's position, the *due account* clause speaks to both the applicability and the interpretation of the prejudicial error rule. The open-ended and minimalistic structure of the statute makes this apparent. With an extensive working vocabulary, Congress could have easily written the harmless error provision to conform with Petitioner's

---

[20] *See infra* pp. 41-48.

more limited construction by inserting the word "applicability" or a similar term or phrase. *Compare* 38 U.S.C. § 7261(a)(1) (The Veterans Court shall "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning and *applicability* of the terms of an action of the Secretary; . . . ") (emphasis added); 38 U.S.C. § 7261(b)(1) ("take due account of the Secretary's *application* of section 5107(b)") (emphasis added); 38 U.S.C. § 7292(c), (d)(2) (Congress confers Federal Circuit jurisdiction over Veterans Court decisions involving "any interpretation" of a law, but expressly bars review of a "challenge to a law . . . as applied").

For example, Petitioner's argument would stand on firmer ground if § 7261(b)(2) read: the Veterans Court "shall take due account of [the applicability of] the rule of prejudicial error." *See generally Ali v. Federal Bureau of Prisons*, ___ U.S. ___, 128 S.Ct. 831, 840 (2008) ("Had Congress intended to limit § 2680(c)'s reach as petitioner contends, it easily could have written 'any other law enforcement officer *acting in a customs or excise capacity*.' Instead, it used the unmodified, all-encompassing phrase 'any other law enforcement officer' ".). As it is, the unmodified *due account* clause, not limited to a specific purpose (*i.e.*, determining the applicability or interpretation of the prejudicial error rule) has an unrestricted reach.

Apart from the structure of the statute, Congress' longstanding commitment to those who have served in the military informs § 7261(b)(2), *see Fishgold v.*

Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . ."); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."). The nonadversarial spirit of the VA adjudication system also imbues § 7261(b)(2). *See Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) ("We recognize harmless error applies in the Social Security context. . . . Fleshing out the standard's contours of application in this unique, nonadversarial area, however, leads us to conclude we must decline the Commissioner's current invitation to employ it here.").

Petitioner disagrees, insisting that the nonadversarial approach at the administrative level is separate and distinct from the adversarial process at the judicial level:

> As this Court has observed, the VA's administrative claims-adjudication process is nonadversarial and is "designed to function throughout with a high degree of informality and solicitude for the claimant." Judicial review in the Veterans Court, however, is quite different: it follows the traditional adversarial model of appellate litigation. The act of filing an appeal to the Veterans Court "is the first step in an adversarial process challenging the Secretary's decision on benefits,"

> separate and distinct from the VA administrative process.
>
> . . . . The rule of prejudicial error is a limit on the exercise of *judicial* authority, and the fact that the challenged decision was reached through a nonadversarial administrative proceeding does not alter the operation of the rule that a party seeking to invoke the remedial powers of a federal court must demonstrate prejudicial error.

BP at 24-25 (internal citations omitted).

Petitioner's argument cannot withstand scrutiny. Admittedly, a claimant loses certain procedural advantages when the claim moves from the administrative to the judicial level. For example, a claim is subject to issue-exhaustion at the judicial but not administrative level. *See Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005) ("We have previously held that *Sims*[21] is inapplicable to proceedings before the Veterans Court, because those proceedings are adversarial in nature. However, proceedings before the Board, like those before the Social Security Council, are non-adversarial.") (internal citations omitted).

Despite their differences, the Veterans Court and the Agency make up the same specialized system for adjudicating claims of disabled veterans and their dependents. *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michael, J., concurring) ("The

---

[21] *Sims v. Apfel*, 530 U.S. 103 (2000).

Board of Veterans' Appeals, of course, is not a trial court and the Court of Veterans Appeals, while surely an appellate court, is an Article I court set in a *sui generis* adjudicative scheme for awarding benefit entitlements to a special class of citizens, those whose risked harm to serve and defend their country. This entire scheme is imbued with the special beneficence from a grateful sovereign.").

The two, therefore, must interact synergistically as one integrated system. *U.S. v. Morgan*, 307 U.S. 183, 191 (1939) ("[I]n construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute"); *Fishgold*, 328 U.S. at 285 (1946) ("Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.").

This interplay between judicial and administrative function necessarily implicates the Agency's unique adjudicatory mission. In large part, VA proceedings are about record development: *e.g.*, assisting claimants to find and retrieve relevant documents,[22]

---

[22] 38 U.S.C. § 5103A(b)-(c).

producing medical examination and opinion evidence on their behalf,[23] and notifying claimants of missing evidence necessary to prove their claims.[24] These paternalistic obligations exist independently from the Agency's successive fact-finding and decision-making role. Therefore, the record must be developed to its optimum *before* the VA can decide the merits of the claim. *See McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008) ("Taken together, the passage of Veteran's Judicial Review Act §§ 103(a) and 203(a) create a statutory context in which the VA is required to assist the veteran claimant with fully developing a record before making a decision on the veteran's claim. This fully developed record then forms the basis of a Board decision."). *Manio v. Derwinski*, 1 Vet. App. 140, 144 (1991) ("'Implicit in such a beneficial system has been an evolution of a completely ex parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'") (internal quotation and citations omitted).

In short, the Agency's record-developing duties are seminal to its adjudicatory function, sharply

---

[23] 38 U.S.C. § 5103A(d).

[24] 38 U.S.C. § 5103(a); *see also* 38 C.F.R. § 3.103(c)(2) ("It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which may be of advantage to the claimant's position.").

distinguishing its inquisitorial process[25] from the adversarial model of virtually every other adjudicatory system.[26] To ignore altogether these pro-claimant features at the judicial level would be to lose sight of the overall function and purpose of the system. *See Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (noting that Veterans Court's adjudication of claims must be consistent with uniquely pro-claimant VA system). A comparison of other adjudicatory forums illustrates this point.

In civil, criminal and most administrative proceedings, appellate review assumes a fully developed record; each party at the trial or administrative level prepares and submits into the record all their respective evidence. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). Unlike

---

[25] *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, J., dissenting) ("Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus. It is entirely inquisitorial in the regional offices and at the Board of Veterans' Appeals where facts are developed and reviewed.").

[26] *See Sims*, 530 U.S. at 110-11 (Social Security Disability Benefits System is based upon a nonadversarial and inquisitorial model).

the Secretary in the pro-claimant VA system, adversarial litigants bear no responsibility to advise opponents of evidence necessary for prevailing in the case. *See* 38 U.S.C. § 5103(a).

Consequently, in the typical appellate setting, the standard *Kotteakos* inquiry serves reviewing courts well in resolving the harmless error question: *i.e.*, the extent of the error's prejudice, if any, is measured against a fully developed record on appeal. *See generally Kotteakos*, 328 U.S. at 765; *see also Arizona v. Fulminante*, 499 U.S. 279, 307-08, 310 (1991) (Rehnquist, J., concurring) ("The common thread connecting these cases is that each involved 'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore *be quantitatively assessed in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt. . . . When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.") (emphasis added); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) ("Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts."); *Charter v. Chleborad*, 551 F.2d 246, 249 (8th Cir. 1977) (civil case: "Defendant's final argument against reversal is that any error was harmless

and did not affect a substantial right of the plaintiff. To pass on this argument we must view the total circumstances of the case.") (footnote omitted); *Aetna Cas. and Sur. Co. v. Gosdin*, 803 F.2d 1153, 1159 (11th Cir. 1986) ("We must assess whether, in light of the strength of the other evidence, the admission of the prejudicial evidence was harmless.").

On the other hand, the Veterans Court's ability to decide questions of prejudice in connection with § 5103(a) notice violations is severely compromised. In this procedural posture, the Veterans Court reviews a presumptively incomplete record; it can only guess about additional evidence that might have been submitted by the claimant with proper notice. *Washington v. Nicholson*, 21 Vet. App. 191, 195 (2007) ("The Court cannot speculate whether the appellant actually would have submitted such evidence if provided the opportunity . . . ").

For instance, had the Respondent received adequate § 5103(a) notice, "it is possible that [he] would have sought and obtained additional medical opinions, evidence, or treatises [or other relevant documents] to rebut the [VA's] evidence." *Daniels v. Brown*, 9 Vet. App. 348, 353 (1996) (rejecting the Secretary's harmless error argument after determining that the VA violated the notice requirement under *Thurber v. Brown*, 5 Vet. App. 119 (1993)); *Marsh v. West*, 11 Vet. App. 468, 471 (1998) (following the *Daniels* holding). Further still, Respondent might have submitted other probative evidence, medical or otherwise, leading the VA to procure evidence necessary for substantiating

his claim. *Pelegrini v. Principi*, 18 Vet. App. 112, 121 (2004) ("Further, it would require pure speculation for the Court to determine at this time that, once given the notice to which he is entitled, the appellant definitely could not provide or lead VA to obtain the information or evidence necessary to substantiate his service-connection claim.").

On this score, Petitioner submits:

> In these cases, for example, Sanders allegedly failed to receive notice of "who would ultimately be responsible for obtaining evidence necessary to substantiate [his] claim" . . . while Simmons allegedly failed to receive notice "of the evidentiary prerequisites for establishing" her claim . . . Those errors might have prejudiced respondents by making it more difficult for them to provide appropriate evidentiary support for their claims. The only way to determine whether there was prejudice, however, is to conduct an inquiry into whether, in the absence of the notice error, respondents would have been able to submit additional evidence. *The record before the Veterans Court includes the VA's entire file, and respondents are in a far better position than the VA to know what additional evidence they might have submitted about their own medical condition.*

BP at 35-36 (emphasis added).

Critically, Petitioner fails to explain how Respondent's subjective knowledge of what he might have submitted with proper notice is (or can be made) a

part of the record on appeal. At the Veterans Court, a claimant may not fill this evidentiary gap through the submission of extra-record evidence: whether in the form of declarations, offers of proof or less formal written or oral testimonials. The controlling statutes are categorical, and do not provide for an extra-record exception under any circumstances.[27] 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); 38 U.S.C. § 7261(b) ("In making the determination under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans Appeals pursuant to section 7252(b). . . . ").[28]

---

[27] *Compare* 38 U.S.C. § 7261(b)(1)(c) ("*In no event* shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to *trial de novo* by the Court.") (emphasis added) *with* 5 U.S.C. § 706(F) (The reviewing court shall set aside agency action, finding or conclusion "unwarranted by the facts to the extent that the facts are subject to *trial de novo* by the reviewing court.") (emphasis added); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (Under § 706(F), "such de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.").

[28] *See* Vet. App. R. 11(a) ("The Secretary retains the original claims file. The Secretary must transmit to the Clerk two certified copies of the record on appeal . . . "); Vet. App. R. 11(b)(1) ("If, after the record on appeal has been transmitted to the Clerk and before the filing of the appellant's brief . . . , a party believes that an additional material that was *before the Secretary and the Board* is relevant to an issue on appeal, the

(Continued on following page)

Save for one misguided exception, the statutory bar against considering extra-record evidence has been strictly enforced. *See Mlechick v. Mansfield*, 503 F.3d 1340, 1345-46 (Fed. Cir. 2007) (deciding all issues of prejudice, including those involving VCAA notice errors, the Veterans Court should review the entire administrative record); *Wilhoite v. West*, 11 Vet. App. 251, 252 (1998) (per curiam); *Rogozinski v. Derwinski*, 1 Vet. App. 19, 20 (1990) (holding that although claimant made reference to specific medical records at an administrative hearing, claimant's failure to submit them into the administrative record precluded consideration of these records on judicial review); *but see Washington*, 21 Vet. App. at 195 (noting for harmless error review of a § 5103(a) defect "the appellant need not have actually submitted [the missing] evidence to support his pleading of prejudice because the Court cannot consider new evidence in the first instance", but appellant must make an offer of proof in his appellate brief – "a description of the evidence that he would have submitted if VA had notified him.").[29]

---

party may file a motion to supplement the record.") (emphasis added).

[29] *Washington* overlooks the evidentiary nature of an offer of proof. For appellate purposes, an offer of proof is every bit as evidential as the evidence it describes. One or the other must be made part of the record at the trial or administrative proceedings. *See* 1 Wigmore, *Evidence* § 20a at 864 (Tillers rev. 1983) ("An offer of proof . . . is required because an appellate court needs an adequate basis for determining whether a trial court's

(Continued on following page)

error regarding an evidentiary matter is prejudicial or merely harmless. . . . The offer of proof places the excluded evidence on the record so that the appellate court can determine whether the improper exclusion of evidence at trial warrants reversal.") (footnote omitted).

As such, on judicial review, neither the claimant nor the government may allege facts in his/her appellate brief or in any other submission without evidentiary support in the administrative record. *Schley v. Pullman's Palace Car Co.*, 120 U.S. 575, 578 (1887) ("It is only necessary to say that the facts *dehors* the record, which have been improperly introduced into the brief of the counsel for the defendant. . . ."); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) ("Indeed, in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held.") (internal citations omitted); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1127-28 (2nd Cir. 1989) ("The merest novice in the law knows that '[f]actual statements contained in a party's brief are not a part of the record.' (Citations omitted)."); *Turner v. Burnside*, ___ F.3d ___ (11th Cir. 2008) (Case No. 07-14791) (holding that facts stated in appellate brief but not found in the record are disregarded); *Nelson v. Swing-A-Way Mfg. Co.*, 266 F.2d 184, 190 (8th Cir. 1959) ("In deciding this case we have, of course, not taken into consideration matters included in the defendant's brief which were not before the trial court and are no part of the record on appeal."); *In Re Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir. 1959) ("Factual statements contained in a party's brief are not a part of the record. . . ."); *compare Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 350 (1997) (holding that extra-record evidence may be considered for purposes of court review of agency determination of bid protest because "[a]s a practical

(Continued on following page)

In the event of a VCAA notice violation, Petitioner nonetheless assumes that Respondent's claims file[30] will invariably contain all potentially relevant evidence from which Respondent can easily identify the *existing* document(s) he would have otherwise submitted. BP at 36. Petitioner, however, overlooks a fundamental dynamic of the VA evidence-development process. Record development entails more than

---

matter, . . . in most bid protests, the 'administrative record' is something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review.").

The Veterans Court, like any appellate tribunal, is not an appropriate forum for fact-finding. *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). Thus, if claimants or the Agency were permitted to introduce extra-record evidence, the Veterans Court would be placed in the awkward position of having to make factual determinations in the first instance. In *Murillo v. Brown*, 8 Vet. App. 278, 280 (1995), the Veterans Court explains:

> For the Court to base its review on documents [or other submissions] not included in the Board's calculus at the time it rendered its decision would render the Court a fact finder de novo, exceeding its authority under the statutory scheme which establishes the Court as an appellate body.

(internal citations omitted); *Bonhomme v. Nicholson*, 21 Vet. App. 40, 43-44 (2007) (using similar analysis).

[30] The "claims file" refers to a permanent filed compiled by the Agency for the purpose of adjudicating a claimant's VA benefits claim(s). This file contains all written communications, records and documents generated or received by, or sent to, the VA in connection with the claim(s). *Veterans Benefits Manual*, § 16.3.3.2 at 1310; *Bell v. Derwinski*, 2 Vet. App. 611, 612-13 (1992) (holding that VA generated documents are constructively part of the claims file).

collecting *existing* records: *e.g.*, service medical records, post-service VA medical treatment records, private medical records. *See* 38 U.S.C. § 5103A(c); 38 C.F.R. § 3.159(c). The process also involves the *production* (*i.e.*, creation) of new evidence, medical or otherwise.[31] In many instances, claimants must *produce* their own evidence to substantiate their claims. Therefore, § 5103(a) – the impetus for claimant participation – is critically important. Section 5103(a) acts as a catalyst, prompting claimants to *produce*[32] evidence when the Agency will not. *Washington*, 21 Vet. App. at 197 (Hagel, J., concurring) ("The duty to notify compels that Secretary to apprise claimants like Mr. Washington not only that medical evidence is required to substantiate the claim, but also whether VA will assume responsibility for obtaining such evidence by providing a medical examination or opinion or whether the claimant is ultimately responsible for obtaining that evidence on his own. *See* 38 U.S.C. § 5103(a).").

---

[31] *E.g.*, *Sizemore v. Principi*, 18 Vet. App. 264, 274 (2004) (a lay statement prepared by a fellow soldier may corroborate the claimant's allegations of an in-service incurrence or injury).

[32] Petitioner mistakenly assumes that all potential relevant evidence which is not part of the record *exists* and is easily obtainable by the claimant. BP at 35 ("By contrast, if there actually *is* evidence concerning the claimant's medical condition that is not already in the record and would demonstrate that benefits could be awarded, the claimant is far more likely to be the one with access to that information.").

By further example, to prevail in a claim for service-connected benefits, a claimant usually must establish a nexus between his present disability and in-service incurrence. *Veterans Benefits Manual*, § 3.4 at 93 ("[T]he most common reason VA claims for disability compensation are not successful is the failure to prove a nexus between the current disability and something that occurred during the period of military service"). In most cases, this nexus requirement calls for a medical expert opinion.[33] *See Bloom v. West*, 12 Vet. App. 185, 187 (1999) (holding that the claim failed for lack of medical nexus opinion); *Rucker v. Brown*, 10 Vet. App. 67, 71 (1997) ("Where the determinative issue involves either medical etiology or a medical diagnosis, competent medical evidence is required. . . ."). But, unless provided by the VA, this necessary medical nexus evidence will not be found in the claims file, as it does not yet exist. Or, this evidence exists only in a hypothetical sense at the judicial level: what medical evidence a claimant now says he would have produced and submitted into the record had he been given adequate notice. *See Mayfield I*, 19 Vet. App. at 125 (drawing distinction between actual or *existing* evidence and evidence yet to be *produced*).

---

[33] 38 C.F.R. § 3.159(a)(1) ("Competent medical evidence means evidence by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.").

Thus, while the government may well be correct that Respondent enjoys a better (but not prescient[34]) position to know what evidence he might have submitted, he is in no position at all to make this hypothetical evidence part of the appellate record. Lacking any way to establish prejudice, Respondent is effectively foreclosed from obtaining meaningful judicial review of § 5103(a) notice violations. *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action . . . it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.") (internal citation omitted); *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("[I]t was for the purpose of ensuring that veterans were treated fairly by the government and to see that all veterans entitled to benefits received

---

[34] While a claimant arguably has a good idea of what type of evidence he would have *attempted* to produce, he could never know exactly what that would be. Take, for instance, a claimant alleging he would have sought a medical nexus opinion from his treating physician had he been given an adequate § 5103(a) notice. Under this scenario, the claimant would likely know the questions he would have asked the physician and the information upon which the physician would have based his opinion. *See Veterans Benefits Manual*, § 16.1.6, at 1288; *id.* § 16.6.8.1, at 1346-49. But, unless he actually secured a medical opinion, the claimant could only speculate as to the physician's potential findings.

them and that Congress provided for judicial review through the Veterans' Judicial Review Act ("VJRA") of 1988").

III. NOTICE UNDER 38 U.S.C. § 5103(a) IS A SUBSTANTIAL RIGHT, A VIOLATION OF WHICH GIVES RISE TO PRESUMED PREJUDICE; THE FEDERAL CIRCUIT'S CALCULUS FOR PREJUDICIAL ERROR ALLOWS THE GOVERNMENT TO ESTABLISH HARMLESS ERROR WITHOUT RESORTING TO EXTRA-RECORD EVIDENCE

In his brief, Petitioner contends that a violation of § 5103(a) should not give rise to presumed prejudice, as it does not have "'the natural effect . . . to prejudice a litigant's substantial rights.'" BP at 30 (citing *Kotteakos*, 328 U.S. at 760). Petitioner is incorrect.

As a threshold matter, Petitioner does not dispute that VCAA notice is an important and substantial right. Quoting the Federal Circuit, Petitioner observes:

> [T]he VCAA's notice requirements have a "fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system," because they help to provide "a claimant a meaningful opportunity to participate effectively in the processing of his or her claim." (Citation omitted).

BP at 22; *id.* (stating that such "observation is correct"); *see also Locklear*, 20 Vet. App. at 414 ("The duty to notify was designed by Congress with one purpose in mind – to facilitate and maximize the collaborative process that is the cornerstone of the VA claims process."); *Washington*, 21 Vet. App. at 197 (Hagel, J., concurring) (discussing the crucial interplay between the duty to notify under § 5103(a) and the duty to assist under § 5103A); 9th Judicial Conference of the United States Court of Appeals for the Veterans Claims (April 24 and 25, 2006), *reprinted* at 21 Vet. App. CLXXXI (Statement of Chief of the Advisory and Veterans Court Staff with VA Compensation and Pension Service: "[The VCAA] has been a very good piece of legislation, it has given us a greater – greater requirements [sic] that has all been good, it's [sic] resulted in us helping veterans better, which is what we are here for. We are required – there are two parts to the VCAA, one is to provide notice of the evidence necessary to substantiate the claim, we are required to tell the claimant who is going to get that evidence, what evidence that VA will get, what evidence they are required to provide to us, and also to tell them that they need to submit any other evidence they may have pertinent to that particular claim.").

Rather than focus upon the nature or importance of the right to VCAA notice (*e.g.*, technical/substantial

or central/peripheral),[35] Petitioner conjures up the *possibility* that the prejudice of a § 5103(a) violation will be cured, most likely by subsequent VA procedures:

> To the contrary, there are several reasons why a notice error *may* result in no prejudice to a VA claimant. The claimant *may* already be aware, through means other than a VCAA notice, of the types of evidence needed to substantiate his or her claim. Or the claimant *may* simply have no additional relevant evidence to submit. More importantly, in contrast to *Kotteakos*, in which review by the court of appeals provided the first opportunity to correct a trial-court error, the informal and non-adversarial process for adjudicating claims for veterans benefits provides many procedural safeguards that have the *potential* to cure any defect in the initial Section 5103(a) notice. . . . A rule of presumptive prejudice, however, would be difficult for the VA to overcome – even in cases where there is no prejudice – and would therefore lead to unnecessary remands that would delay the resolution of meritorious claims.

BP at 30-31 (emphasis added) (internal citations omitted); *see id.* at 34-35.

---

[35] *See Jordan v. Medley*, 711 F.2d at 219 (prejudicial error issue turns upon, among other things, the centrality of right affected and the balanced nature of the evidence bearing on the right affected); *McCandless*, 298 U.S. at 348 (exclusion of evidence on pivotal issue gives rise to prejudice).

Petitioner's tentative assertion, laden with the word *may*, betrays its speculative nature. *Cf.* Black's Law Dictionary 1598 (6th ed. 1990) (the word "'may' is one of speculation and uncertainty."). This very uncertainty counsels against adopting a rule of presumed harmlessness of VCAA notice errors. In fact, Petitioner's reasons for his proposed rule have no support in law or policy.

Specifically, Petitioner claims that 38 U.S.C. § 5104(b) (VA must give statement of reasons of decision and summary of evidence), § 7105(d)(1) (VA must issue a statement of the case, summarizing reason for decision and evidence and law considered) and other statutory and regulatory procedures might cure the prejudice caused by an absent or defective VCAA notice. BP at 33-34.

Petitioner's reliance on these provisions is misplaced. Sections 5104(b) and 7105(d)(1) and their regulatory counterparts were written at a different time and for a different purpose. They certainly do not perform the work of § 5103(a).[36] That much was

---

[36] Petitioner's reliance on the statutory duty to assist under § 5103A is likewise misplaced. BP at 32. The purpose of VCAA notice is to ensure that a claimant can effectively participate in the processing of his/her claim. *Mayfield I*, 19 Vet. App. at 120-21. A claimant's active participation is crucial because, in many instances, the duty to assist will not require the VA to secure a medical examination or opinion on behalf of the claimant. *E.g.*, *Wells v. Principi*, 326 F.3d 1381 (Fed. Cir. 2003). In that situation, proper VCAA notice protects the claimant from losing her claim and potential benefits due to an undeveloped medical

(Continued on following page)

made clear in *Mayfield v. Nicholson* ("*Mayfield II*"), 444 F.3d 1328, 1333 (Fed. Cir. 2006):

> The purpose of the [VCAA notice] statute and the corresponding regulation is to require that the VA provide affirmative notification to the claimant prior to the initial decision in the case as to the evidence that is needed and who shall be responsible for providing it. That duty of affirmative notification is not satisfied by various post-decisional communications from which a claimant might have been able to infer what evidence the VA found lacking in the claimant's presentation. The text of section 5103(b) confirms that Congress envisioned a deliberate act of notification directed to meeting the requirements of section 5103, not an assemblage of bits of information drawn from multiple communications issued for unrelated purposes.
>
> Documents such as the 1999 notice of decision, the 2000 statement of the case, and the 2002 supplemental statement of the case that were sent to [claimant] were required by 38 U.S.C. §§ 5104 and 7105 to advise the claimant of the decision rendered on the claim and to facilitate review of that decision. The VA's obligation to provide those communications to the claimant long

---

record, as the notice advises her not only what evidence is needed, but who is obligated to provide it. *Washington*, 21 Vet. App. at 197 (Hagel, J., concurring).

> predated the VCAA. Unlike sections 5104 and 7105, the post-2000 version of section 5103 requires the VCAA notification to be issued prior to the initial decision on the claim, not afterwards. Moreover, the VCAA notification is required to have different contents from the post-decisional notices, and it is designed for different purposes – to ensure that the claimant's case is present to the initial decisionmaker with whatever support is available, and to ensure that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant.

(internal citations omitted); *see also Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002) (discussing the Secretary's duty to notify and holding that "a letter from the VA to the appellant, describ[ing] evidence potentially helpful to the appellant but . . . not mention[ing] who is responsible for obtaining such evidence" did not meet VCAA standards).

And even if, as Petitioner suggests, other VA procedures may render VCAA notice violations less prejudicial, the Federal Circuit's calculus for harmless error allows the Agency to make the requisite showing of harmlessness:

> [T]he VA must persuade the reviewing court that the purpose of the notice was not frustrated, *e.g.*, by demonstrating: (1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from

> the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law.

App. at 14a-15a.

Significantly, the Federal Circuit's test for harmless error has the virtue of deciding all questions on the administrative record: no after-the-fact proffers, testimonials or other extra-record evidence may be introduced or considered. *See supra* pp. 43-44; *id.* pp. 44-46 n.29. Thus, the Federal Circuit's rule of presumed prejudice respects one of the most fundamental tenets of appellate jurisprudence: a reviewing court may only consider evidence of record.

And, contrary to Petitioner's bleak prediction, the Federal Circuit's rule of presumed prejudice would not make it unduly or unfairly difficult for the Agency to overcome the presumption. BP at 35-36. In fact, several published cases invoking the Federal Court's analysis demonstrate that the VA can successfully rebut the presumption of prejudice in many appropriate circumstances. *E.g.*, *George-Harvey v. Nicholson*, 21 Vet. App. 334, 339-40 (2007) (holding that the deficient VCAA notice was cured because the Agency established the claimant's actual knowledge of what he needed to submit); *Palor v. Nicholson*, 21 Vet. App. 325, 332-33 (2007) (holding that the claimant was not prejudiced by the notice error because the claimant could not be awarded benefits as a matter of law); *Dalton v. Nicholson*, 21 Vet. App. 23, 30 (2007) (holding that the claimant was not prejudiced by deficient

VCAA notice because the Agency established that the claimant's counsel had actual knowledge of what information and evidence needed to be submitted); *Overton v. Nicholson*, 20 Vet. App. 427, 440-41 (2006); *Medrano v. Nicholson*, 21 Vet. App. 165, 172-73 (2007).

CONCLUSION

The judgment of the Federal Circuit should be affirmed.

Respectfully submitted,

MICHAEL A. MORIN
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Ave., NW
Washington, DC 20001-4413
(202) 408-4146

MARK R. LIPPMAN
(*Counsel of Record*)
THE VETERANS LAW GROUP
8070 La Jolla Shores Drive
#437
La Jolla, CA 92037
(858) 456-5840

APPENDIX

1. 28 U.S.C. § 391 (1919) provided:

All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons which new trials have usually been granted in courts of law. On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

2. 38 U.S.C. § 7252 provides, in pertinent part:

Jurisdiction; finality of decisions

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title [38 USCS § 7261]. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title [38 USCS § 1155] or any action of the Secretary in adopting or revising that schedule.

REPLY BRIEF

Supreme Court, U.S.
FILED
NOV 13 2008
OFFICE OF THE CLERK

No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

GREGORY G. GARRE
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. Section 7261(b)(2) incorporates the prejudicial-error rule of the APA, which places the burden of showing prejudice on the party challenging the agency's action 3

B. The VCAA provides no statutory basis for creating a unique rule of prejudicial error applicable only to VA adjudications 10

C. A presumption of prejudice from VCAA notice errors is unwarranted 14

TABLE OF AUTHORITIES

Cases:

Air Canada v. *Department of Transp.*, 148 F.3d 1142 (D.C. Cir. 1998) 5

Air Transp. Ass'n v. *CAB*, 732 F.2d 219 (D.C. Cir. 1984) 6

Chromcraft Corp. v. *EEOC*, 465 F.2d 745 (5th Cir. 1972) 6

City of Sausalito v. *O'Neill*, 386 F.3d 1186 (9th Cir. 2004) 6

Cromer v. *Nicholson*, 455 F.3d 1346 (Fed. Cir. 2006), cert. denied, 127 S. Ct. 2265 (2007) 11

Daniels v. *Brown*, 9 Vet. App. 348 (1996) 19

De Sandoval v. *Attorney Gen.*, 440 F.3d 1276 (11th Cir. 2006) 22

Disabled Am. Veterans v. *Secretary of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005), cert. denied, 547 U.S. 1162 (2006) 16

Cases–Continued: Page

Economic Opportunity Comm'n of Nassau County, Inc. v. *Weinberger*, 524 F.2d 393 (2d Cir. 1975) 6
Hartman v. *Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007) .. 19
Haynes v. *United States*, 390 U.S. 85 (1968) 13
Ibrahim v. *Gonzales*, 434 F.3d 1074 (8th Cir. 2006) 22
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977) 14
Jandreau v. *Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007) 10
John R. Sand & Gravel Co. v. *United States*, 128 S. Ct. 750 (2008) 14
King v. *St. Vincent's Hosp.*, 502 U.S. 215 (1991) 13
Kotteakos v. *United States*, 328 U.S. 750 (1946) 8, 14
Market St. Ry. v. *Railroad Comm'n*, 324 U.S. 548 (1945) 8
McDonald Welding v. *Webb*, 829 F.2d 593 (6th Cir. 1987) 5
McLouth Steel Prods. Corp. v. *Thomas*, 838 F.2d 1317 (D.C. Cir. 1988) 6, 7
Mlechick v. *Mansfield*, 503 F.3d 1340 (Fed. Cir. 2007) .. 21
Morgan v. *Attorney Gen.*, 432 F.3d 226 (3d Cir. 2005) .. 22
Morton v. *West*, 12 Vet. App. 477 (1999), withdrawn, 14 Vet. App. 174 (2000) 11
National Small Shipments Traffic Conf., Inc. v. *ICC*, 725 F.2d 1442 (D.C. Cir. 1984) 6
NLRB v. *Seine & Line Fishermen's Union*, 374 F.2d 974 (9th Cir.), cert. denied, 389 U.S. 913 (1967) 9
NLRB v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969) 3

Cases–Continued: Page

Palmer v. *Hoffman*, 318 U.S. 109 (1943) 9
Paralyzed Veterans of Am. v. *Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003) 19
Shmyhelskyy v. *Gonzales*, 477 F.3d 474 (7th Cir. 2007) 22
Sprint Corp. v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003) 6, 7
Sugar Cane Growers Coop. v. *Veneman*, 289 F.3d 89 (D. C. Cir. 2002) 6, 7
United States Steel Corp. v. *EPA*, 595 F.2d 207 (5th Cir. 1979) 6
United States v. *Fior D'Italia, Inc.*, 536 U.S. 238 (2002) 14
Vazquez-Flores v. *Peake*, 22 Vet. App. 37 (2008) 20
Wilson v. *Mansfield*, 506 F.3d 1055 (Fed. Cir. 2007) . 19, 20

Statutes and regulations:

Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* 22
Administrative Procedure Act :
5 U.S.C. 553 ..... 6, 7
5 U.S.C. 706 ..... *passim*
Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4115 4
Veterans Benefits Act of 2002, Pub. L. No. 107-330, 116 Stat. 2820:
§ 401(a), 116 Stat. 2832 13
§ 401(b), 116 Stat. 2832 ..... 4, 13
Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat 2096 2

Statutes and regulations–Continued: Page

Veterans' Benefits Improvement Act of 2008, Pub. L. No. 101-389, 122 Stat. 4145 2
§ 101(a)(1), 122 Stat. 4147 (to be codified at 38 U.S.C. 5103(a)(1) (Supp. II 2008)) 2
§ 110(a)(2), 122 Stat. 4147-4148 (to be codified at 38 U.S.C. 5103(a)(2) (Supp. II 2008)) 2
38 U.S.C. 5103(a) 2, 11, 19, 20
38 U.S.C. 5103A 11
38 U.S.C. 5103A(b) 15, 16
38 U.S.C. 5103A(c) 15, 16
38 U.S.C. 5103A(d) 15
38 U.S.C. 5104(b) 15, 19
38 U.S.C. 5107(a) 10
38 U.S.C. 5110(a) 16
38 U.S.C. 7104(a) 16
38 U.S.C. 7105(d) 19
38 U.S.C. 7105(d)(1) 15
38 U.S.C. 7261 13
38 U.S.C. 7261(a) 4
38 U.S.C. 7261(a)(4) (Supp. V 2005) 13
38 U.S.C. 7261(b)(1) (Supp. V 2005) 13
38 U.S.C. 7261(b)(2) (Supp. V 2005) ..... *passim*
38 C.F.R.:
Section 3.103(b)(1) 15
Section 19.31(a) 15

Miscellaneous: Page

Attorney General's Manual on the Administrative Procedure Act (1947) 8
H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1 (1988) ... 12
S. Rep. No. 418, 100th Cong., 2d Sess. (1988) 4, 9

In the Supreme Court of the United States

No. 07-1209

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Congress directed the Court of Appeals for Veterans Claims (Veterans Court) to "take due account of the rule of prejudicial error" in reviewing administrative decisions denying claims for veterans' benefits. 38 U.S.C. 7261(b)(2) (Supp. V 2005). It did so by adopting, almost verbatim, the language of 5 U.S.C. 706, the prejudicial-error rule of the Administrative Procedure Act (APA). That rule has long been interpreted to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error harmed the challenger. The court of appeals erred by reading the prejudicial-error rule out of Section 7261(b)(2) and instead imposing a presumption of prejudice on the Department of Veterans Affairs (VA) in the context of errors involving the notice required by the

Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096.[1]

Respondents contend that the interpretation of Section 706 was not well settled at the time Section 7261(b)(2) was enacted. Their arguments are unpersuasive, however, because the cases on which they rely involved notice-and-comment rulemaking rather than agency adjudications like the benefit determinations at issue here. Respondents also fail to take account of the legislative history of Section 7261(b)(2), which demonstrates not only that Congress intended to incorporate the APA's rule of prejudicial error, but also that Congress understood that rule to be incompatible with a presumption of prejudice.

Similarly misplaced are respondents' arguments based on the non-adversarial nature of the VA administrative process. Veterans Court review of benefits claims, like other judicial proceedings, is adversarial. The non-adversarial character of the administrative process used to determine entitlement to veterans' benefits therefore provides no basis for abandoning ordinary principles of prejudicial error when VA administrative decisions are challenged in court.

Finally, even to the extent that the statutes give the Veterans Court discretion in applying the rule of prejudicial error, respondents fail to identify any sound basis

---

[1] On October 10, 2008, the President signed into law the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, which amended the VCAA. Section 101(a)(1) of that Act redesignates 38 U.S.C. 5103(a) as 38 U.S.C. 5103(a)(1) but makes no substantive changes to it. 122 Stat. 4147. Section 101(a)(2) creates a new subsection, 38 U.S.C. 5103(a)(2), which requires the Secretary to promulgate regulations specifying the content of the notices to be provided to claimants. 122 Stat. 4147-4148.

for presuming prejudice. VCAA notice errors do not have the natural effect of prejudicing the claimant because the VA adjudicative system offers many opportunities to correct any error in providing the initial notice required by the VCAA. Moreover, the claimant is much more likely than is the VA to have access to information that would be relevant to determining whether any notice error affected the agency's disposition of a particular benefits claim.

As this Court has observed, judicial review of an agency's action should not be converted into "a ping-pong game" where remand is "an idle and useless formality." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). By creating a presumption of prejudice that, as a practical matter, would often be impossible for the VA to rebut, the decisions below do just that. Those decisions should be reversed, and the Veterans Court should instead apply ordinary principles of prejudicial-error review, which will provide relief to claimants who have actually been harmed by a VCAA notice error, while avoiding unnecessary remands in other cases.

A. Section 7261(b)(2) Incorporates The Prejudicial-Error Rule Of The APA, Which Places The Burden Of Showing Prejudice On The Party Challenging The Agency's Action

1. In directing the Veterans Court to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2) (Supp. V 2005), Congress used language that is identical in all material respects to that of Section 706 of the APA, which provides that "due account shall be taken of the rule of prejudicial error" when courts review the actions of administrative agencies. 5 U.S.C. 706. As respondent Sanders concedes (Br. 10), Section

7261(b)(2) and Section 706 "have presumptively parallel meaning and application." Respondent Simmons (Br. 34) suggests that it is "unclear" whether the two provisions have the same meaning. But the similarity between the relevant texts, the settled interpretation of Section 706 at the time Section 7261(b)(2) was enacted, and the use of the definite article—suggesting an intent to adopt a specific, preexisting rule of prejudicial error—all lead to the conclusion that the two statutes should be interpreted the same way.

Respondent Simmons points out (Br. 40) that statutory language must be read in context, and that the same words may have different meanings in different statutes if the contexts vary. That proposition is correct as a general matter, but it has no application here. Section 7261(b)(2) and Section 706 both govern judicial review of agency action, and the later-enacted provision was modeled on the earlier one. Indeed, Section 7261(a), which sets out the scope of the Veterans Court's review of VA decisions, is strikingly similar to the corresponding provisions of Section 706.

Any residual doubt about the relationship between Section 7261(b)(2) and Section 706 should be dispelled by the legislative history of the Veterans' Judicial Review Act, the statute that enacted Section 7261(b)(2). Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4115, amended by Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832. As the Senate Committee on Veterans' Affairs explained, Congress sought to "incorporate a reference to the 'rule of prejudicial error' *as included in the APA* (5 U.S.C. 706) so as to limit still further a court's role on review." S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988) (emphasis added); see *id.* at 60 (Although the "standard of review for factual find-

ings is new, the other major scope of review provisions * * * are derived specifically from section 706 of the APA."). There is no basis for construing Section 7261(b)(2) to impose a "rule of prejudicial error" different from the rule that generally applies to judicial review of agency action under the APA.

2. Section 706 of the APA "requires the party asserting error to demonstrate prejudice from the error." *Air Canada* v. *Department of Transp.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998). Respondents argue that courts in APA cases have sometimes assigned the burden of disproving prejudice to the agency, a practice that respondents view as consistent with pre-APA cases placing the burden of showing harmlessness in civil cases on appellees. Respondents also contend that, because the statute directs courts to take "due account" of the rule of prejudicial error, courts retain discretion in deciding where to assign the burden. Those arguments do not withstand scrutiny.

a. Respondents argue that, as of 1988, it was not clear whether the party challenging an agency's action under Section 706 bore the burden of showing prejudice. Although our opening brief (at 15) cited several cases establishing that proposition, respondents note (Simmons Br. 46) that some of those cases were decided after 1988 and that some of them did not explicitly discuss the allocation of the burden of showing (or disproving) prejudice. But in none of the cases was the court's treatment of Section 706 compatible with the proposition that prejudice must be presumed. Moreover, in addition to those cases, there are numerous pre-1988 decisions in which courts of appeals refused to set aside agency action because the party challenging the action had not shown prejudice. See, *e.g.*, *McDonald Welding* v. *Webb*,

829 F.2d 593, 595 (6th Cir. 1987); *Air Transp. Ass'n* v. *CAB*, 732 F.2d 219, 224 n.11 (D.C. Cir. 1984); *National Small Shipments Traffic Conf., Inc.* v. *ICC*, 725 F.2d 1442, 1449 (D.C. Cir. 1984); *Economic Opportunity Comm'n of Nassau County, Inc.* v. *Weinberger*, 524 F.2d 393, 399-400 (2d Cir. 1975); *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745, 747 (5th Cir. 1972). Those decisions make clear that reviewing courts in APA cases did not apply a presumption of prejudice akin to that imposed by the court of appeals in this case.

Respondents contend (Simmons Br. 35-36, 47) that the courts of appeals in other APA cases have required the agencies involved to prove that prejudice did not result from the agencies' errors. Most of those cases, however, did not arise out of agency adjudications, but rather involved failures by rulemaking agencies to comply with the notice-and-comment requirements of 5 U.S.C. 553. See, *e.g.*, *Sprint Corp.* v. *FCC*, 315 F.3d 369, 376-377 (D.C. Cir. 2003); *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002); *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988); *United States Steel Corp.* v. *EPA*, 595 F.2d 207, 215 (5th Cir. 1979). Unlike a VA benefits determination, which involves the application of specific statutory criteria to a discrete set of facts, agency rulemaking decisions frequently involve the exercise of substantial discretion. It would be particularly difficult for a party challenging a newly promulgated regulation to demonstrate that the agency would have exercised that discretion in a different way if it had complied with the notice-and-comment requirements set forth in 5 U.S.C. 553. See *City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004) (distinguishing between the application of Section 706 "[i]n the rulemaking context" and "[i]n other

contexts"); cf. pp. 14, 17-19, *infra* (explaining that proper allocation of evidentiary burdens may depend in part on which party has greater access to the relevant proof).

In any event, the District of Columbia Circuit in the cases cited above has not held that *every* deviation from the requirements of 5 U.S.C. 553 is presumptively prejudicial. Rather, it has held that a rulemaking agency must disprove prejudice when the challenger demonstrates the agency's "utter failure" to provide any opportunity for public comment on the regulatory provision that was ultimately adopted. *Sprint Corp.*, 315 F.3d at 376 (quoting *Sugar Cane Growers Coop.*, 289 F.3d at 96); see *McLouth*, 838 F.2d at 1324 (distinguishing prior decisions that had required challengers to show prejudice "where the agency merely failed to provide proper access to some *supplemental* study or studies that partially undergirded its rule," and concluding that "imposition of such a burden on the challenger is normally inappropriate where the agency has completely failed to comply with § 553"). The burden-shifting rule adopted by the court of appeals for VA benefits cases extends well beyond cases in which the VA has *entirely* failed to provide notice to the claimant.

Moreover, even in cases involving the complete failure by rulemaking agencies to comply with 5 U.S.C. 553, the District of Columbia Circuit has simply held that challengers need not demonstrate that the provision of notice would have resulted in the adoption of a different rule. The court has not suggested that a challenger could obtain vacatur of an agency regulation, and a remand for further administrative proceedings, without even specifying the comments it would have submitted if notice-and-comment procedures had been followed. Respondents, by contrast, have not simply failed to es-

tablish that the presentation of specified additional evidence would have caused the VA to award them benefits. Rather, they have failed to identify any additional evidence that they would have submitted if the VA had fully complied with the VCAA's notice requirements.

b. Respondents also rely (Simmons Br. 43-44; Sanders Br. 18-19, 22-30) on various judicial decisions that preceded the adoption of the APA. To the extent that those cases involved judicial review of agency action—as opposed to appellate review of trial-court proceedings—they are consistent with the proposition that administrative decisions should not be overturned unless a showing of prejudice has been made. See, *e.g.*, *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 562 (1945) (noting that "due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties," and declining to reverse an agency's decision "in the absence of any showing of error or prejudice"); see also *Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (citing *Market St. Ry.*). Respondents contend that the burden of establishing prejudice was placed on the party challenging agency action only in cases involving "technical" errors, as opposed to errors whose "natural effect is to prejudice a litigant's substantial rights." Simmons Br. 43-44 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946)). Even if that were true, however, a VCAA notice error is more appropriately considered a technical error than one that has the natural effect of prejudicing substantial rights. See pp. 14-23, *infra*.

In any event, what matters for purposes of interpreting Section 7261(b)(2) is not the pre-APA rule; it is the rule as Congress understood it in 1988. And even if re-

spondents' distinction between "technical" and other errors still governed when the APA was enacted in 1946, but see *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943), there is no evidence that courts were continuing to apply that distinction, or that Congress understood them to be doing so, when Congress enacted the VCAA in 1988.

To the contrary, the Senate Committee on Veterans' Affairs made clear its understanding of Section 706 by citing the Ninth Circuit's decision in *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974 (9th Cir.), cert. denied, 389 U.S. 913 (1967), a case in which the court had stated that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." 374 F.2d at 981 (quoting *Palmer*, 318 U.S. at 116). See S. Rep. No. 418, *supra*, at 61. Respondents point out (Simmons Br. 38) that the Committee did not actually quote the language from *Seine & Line Fishermen's Union* about the allocation of the burden. But the Committee did quote the statement that "[p]rocedural irregularities are not per se prejudicial," and it expressed its view that "a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case." S. Rep. No. 418, *supra*, at 61 (quoting *Seine & Line Fishermen's Union*, 374 F.2d at 981). Those statements cannot be reconciled with the rule of presumptive prejudice adopted by the court of appeals in these cases.

c. Finally, respondents contend (Simmons Br. 13; Sanders Br. 32-35) that, because Section 7261(b)(2) uses the phrase "due account," a reviewing court possesses discretion to determine which party should bear the burden of proving or disproving prejudice. But as explained in the opening brief (at 12-13), Section 7261(b)(2)'s reference to "*the* rule of prejudicial error" presumes the

existence of an established rule that cannot be altered from case to case at the discretion of the reviewing court. A court takes "due account" of the rule by examining the record and determining whether an error in a particular case is prejudicial. It cannot take "due account" of the rule by changing what the rule is.

B. The VCAA Provides No Statutory Basis For Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

The court of appeals believed that the VCAA had "substantially overhauled the administration of the VA benefits system," thereby "abrogat[ing]" Congress's previously stated intent to follow the APA's rule of prejudicial error. Pet. App. 20a-21a. Respondents make little effort to defend that reasoning; indeed, Simmons correctly acknowledges (Br. 13) that nothing in "the VCAA's notice provision speaks directly to the allocation of the burden." Instead, like the court of appeals, Pet. App. 16a, respondents emphasize the non-adversarial, pro-claimant nature of the VA's benefits system. That argument ignores not only the statutory history discussed above, but also the important differences between the VA's administrative process and the subsequent proceedings in which courts review the agency's decisions.

1. Although the VA's administrative adjudication system generally has a pro-claimant orientation, the system is not completely one-sided. In particular, 38 U.S.C. 5107(a), which respondents ignore, provides that "a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary." See *Jandreau* v. *Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007) ("[T]he veteran has the evidentiary

burden of establishing his claim."); *Cromer* v. *Nicholson*, 455 F.3d 1346, 1350 (Fed. Cir. 2006), cert. denied, 127 S. Ct. 2265 (2007). Congress's decision to place other subordinate burdens on the VA, such as the duty to provide notice under 38 U.S.C. 5103(a) and the duty to assist under 38 U.S.C. 5103A, does not mean that Congress intended all burdens to fall on the VA. On the contrary, because the claimant bears the ultimate responsibility for establishing entitlement to benefits, Congress has found it necessary to make an express statement when it wished to place burdens on the agency. Significantly, it did not do so in Section 7261(b)(2).

No VCAA provision either explicitly or by necessary implication shifts to the VA the burden of showing that particular errors did not prejudice the claimant. As explained in our opening brief (at 20-22), the purpose of the VCAA was not to effect a radical overhaul of the VA's claims-adjudication system—much less an overhaul of the process of judicial review of the VA's decisions. Instead, its purpose was simply to overturn the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477 (1999), withdrawn, 14 Vet. App. 174 (2000) (per curiam), and to return the VA to its pre-*Morton* practice of assisting all veterans in the development of their claims. Respondents argue (Simmons Br. 23) that in overturning *Morton*, Congress "determined that the VA cannot fail to assist all veterans even if it perceives such assistance to be unnecessary based on the veteran's failure to show the merit of his claims." But Congress's decision to override *Morton* has no bearing on the question whether a remand is necessary in the absence of a showing of prejudice. The overturning of *Morton* merely vindicated the VA's consistent position that it generally will assist all claimants without requiring any threshold

evidentiary showing (such as proof of a "well-grounded claim") that a particular veteran is entitled to benefits. That determination about the extent of the VA's administrative duty to assist is not at issue in this case, which concerns the appellate role of the Veterans Court. Congress's decision to eliminate any evidentiary threshold for VA assistance does not mean that a litigant invoking *judicial* remedies need not show prejudice.

2. Respondents emphasize (Simmons Br. 14-15) the non-adversarial nature of the VA administrative process. But Congress intended judicial review of the VA's benefits decisions to function in the same adversarial manner that characterizes judicial review of other agency actions. See, *e.g.*, H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 29 (1988) (explaining that Congress "has drawn on the law establishing" the Tax Court "as a model" for the Veterans Court). And a non-adversarial administrative process is entirely compatible with an adversarial process of judicial review in which the party who alleges that an error occurred in the (non-adversarial) administrative proceedings bears the burden of showing prejudice. For example, as noted in our opening brief (at 25), that is precisely the regime that governs Social Security disability proceedings.

Much of respondents' argument rests on the premise that it is somehow unrealistic to ask a claimant, after completing a non-adversarial administrative process in which a VCAA notice error occurred, to articulate some basis for concluding that the error affected the outcome of the proceeding. But the question of prejudicial error arises only upon an appeal by the claimant. In order to appeal the decision of the Board of Veterans' Appeals (Board) to the Veterans Court and raise a VCAA notice issue, the claimant necessarily will have concluded that

he or she received inadequate notice and will have initiated an adversarial proceeding raising that argument. To the extent that the error was prejudicial, the incremental burden of showing prejudice would be slight, and imposing that burden in *judicial* proceedings is by no means inconsistent with the non-adversarial nature of the administrative system.

Respondents assert (Simmons Br. 15-16) that the process of judicial review, like the administrative process, "operates in favor of the veteran." See Sanders Br. 37-39. As examples of the pro-veteran court system, they cite 38 U.S.C. 7261(b)(1) (Supp. V 2005), which directs the Veterans Court to "take due account" of the Board's application of the reasonable-doubt requirement, and 38 U.S.C. 7261(a)(4) (Supp. V 2005), which prohibits the Veterans Court from overturning "a finding of material fact" that is favorable to the claimant. Neither of those provisions says anything about the application of the rule of prejudicial error. More importantly, both of them were added to Section 7261 after the enactment of the provisions at issue here. See Veterans Benefits Act of 2002, Pub. L. 107-330, § 401(a) and (b), 116 Stat. 2832. Those subsequent amendments to Section 7261 shed no light on what Congress meant in 1988 when it required the Veterans Court to take due account of the rule of prejudicial error. See *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968).[2]

---

[2] Respondents also invoke (Sanders Br. 12; Simmons Br. 32-33) "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). As they acknowledge, however, that principle is applicable only in cases of statutory ambiguity. And if "[s]pecific statutory language" would be sufficient to rebut any presumption in favor of a pro-claimant reading of the statute, then "a

C. A Presumption Of Prejudice From VCAA Notice Errors Is Unwarranted

Even if Section 7261(b)(2) left the allocation of the burden of showing prejudice to the discretion of the Veterans Court, the rule of presumptive prejudice imposed by the court of appeals would still be unwarranted. As respondents acknowledge (Simmons Br. 23), burdens are appropriately allocated based on "judicial evaluations of probabilities" as well as "a party's superior access to the proof." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977); see *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002). In the VCAA context, both of those factors point to placing the burden of showing prejudice on the party claiming error. First, the VA's administrative process for adjudicating benefits claims offers many procedural safeguards that have the potential to cure any harm resulting from an initial VCAA notice error. The VA's failure to comply fully with the statutory notice requirements therefore is not an error whose "natural effect is to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760. Second, once the case has reached the Veterans Court and a notice error has been discovered, the claimant is in a much better position than the VA to determine whether there has in fact been any prejudice.

1. Respondents devote considerable effort to establishing the proposition that the notice required by the VCAA can be very important to claimants. That is undisputed: the importance of notice is one reason that Congress chose to enact the VCAA, codifying the VA's

---

definitive earlier interpretation" of the statutory language "should offer a similarly sufficient rebuttal." *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756 (2008).

practice of providing notice. But it does not follow that the failure to provide notice—or a technical error in the provision of that notice—is always, or even often, prejudicial.

Respondent Simmons contends (Br. 21) that, in the absence of proper VCAA notice, the "claim is likely to be denied." That assertion is baseless. The VCAA was not enacted until 2000, yet claims were often granted in the preceding decades, even though notice and claim-development requirements were not as specifically defined as they are under current law. That should not be a surprise, because even if the initial notice is deficient or nonexistent, the claimant may already be aware of the evidence that should be presented to support a claim. And the VA has an obligation—independent of its notice duties under the VCAA—to make reasonable efforts to obtain records relevant to the claim. 38 U.S.C. 5103A(b) and (c). When appropriate, it must provide a medical examination. 38 U.S.C. 5103A(d).

Moreover, as our opening brief explains (at 32-35), even if a veteran's claim is denied by the regional office, further administrative review may provide relief to the claimant before the case ever reaches the Veterans Court. For example, the denial of the claim by the regional office must include a statement of the reasons for the decision and a summary of the evidence that was considered. 38 U.S.C. 5104(b); 38 C.F.R. 3.103(b)(1). That statement will alert the claimant if benefits were denied because of evidentiary insufficiency. If the claimant expresses disagreement with the regional-office decision, the VA must take "such development or review action as it deems proper," 38 U.S.C. 7105(d)(1), and the claimant has additional opportunities to submit evidence, 38 C.F.R. 19.31(a). In addition, review by the

Board is de novo. 38 U.S.C. 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."); *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005), cert. denied, 547 U.S. 1162 (2006).

Respondents are also incorrect in asserting (Simmons Br. 18-19) that the "timing of the notice is significant" because "notice failures have ramifications for the entire claims process." Although the VCAA directs that notice be provided at the beginning of the claim-development process, the failure to provide the notice at that time will not necessarily cause prejudice. As discussed, the VA's duty to develop a claim continues after the regional office issues its decision. And if supporting evidence is not developed until after a claim is initially denied, the delay will not reduce the total amount of any benefits award because the effective date of the award will be the date of the original claim (or the date that is appropriate based on the facts). 38 U.S.C. 5110(a).

According to respondents (Simmons Br. 18), much of the VA's "other required assistance hinges on compliance with the notice provisions." Simmons contends (Br. 19, 21), for example, that if the VA does not notify "at the beginning of the process," the claimant may fail to "schedule additional medical examinations." But the VA's statutory duty to assist in the development of a claim—including providing medical examinations—is in no way dependent on the provision of VCAA notice. 38 U.S.C. 5103A(b) and (c). Whether or not the notice is adequate, the VA will still obtain all evidence of which it is aware and will still schedule medical examinations if appropriate.

Indeed, the facts of these cases demonstrate that the VA can assist in the development of a claim even after a defective VCAA notice. Although the VA's March 2001 letter (J.A. 41-47) did not provide Simmons with the requisite notice of the information and evidence necessary to substantiate her increased-rating claim, the VA nevertheless provided her with audiological examinations in July 2001 and August 2002 in order to evaluate the extent of her service-connected hearing loss, Pet. App. 90a-91a. In addition, before the VCAA was even enacted, the VA provided Simmons with audiological examinations in 1989, 1998, and 1999 to determine whether her service-connected hearing loss had increased. *Id.* at 88a. Much the same is true with respect to Sanders. Despite the VA's insufficient notice, Sanders was able to provide the VA with two medical reports, and he was also examined by a VA ophthalmologist. *Id.* at 46a-47a. Even now, neither respondent has made any effort to explain how additional notice would have benefitted them, or how any deficiencies in notice impeded the VA's performance of its statutory duty to assist them in developing their claims.

2. a. A presumption of prejudice from VCAA notice errors is also inappropriate because the claimant is generally in a much better position than the VA to establish whether prejudice has occurred. If a particular notice error does result in prejudice, it will likely do so by causing relevant evidence not to be presented during the administrative process. The claimant will know whether he or she had such evidence to provide. Conversely, if the error does not cause prejudice, it may be because the claimant already knew the information that would have been provided by the notice, or because there was no additional evidence to present. The VA has little abil-

ity to determine what the claimant knew or to establish the non-existence of additional evidence.

Respondents argue (Simmons Br. 28) that, "[i]f the VA has in fact complied with its duties, then it should be able to show that the veteran was not prejudiced." That is true but beside the point, since the question of prejudice arises only when the agency has *failed* to provide the required notice. Similarly misplaced is the suggestion (Sanders Br. 33) that "an odd result occurs if veterans denied or short-changed VCAA notice are then required to prove the prejudice of this error with an incomplete record caused by the VCAA error itself." See Simmons Br. 28-30. The issue of prejudice arises only if a claimant is able to establish, in the adversarial proceedings in the Veterans Court, that a VCAA notice error occurred. In other words, before the inquiry into prejudice becomes necessary, the claimant will have raised the issue of a notice error with the Veterans Court. And a claimant who possesses information and evidence that would have been responsive to the notice will point that fact out.

Respondents do not explain why a claimant who was able to make the legal arguments necessary to convince the Veterans Court that a notice error had occurred would be unable to show how the error had affected his or her case. By the time a case reaches the Veterans Court, the VA will have provided the appellant with a decision on the claim, which must contain a statement of the reasons for the decision and a summary of the evidence considered by VA. The agency's decision must also contain at least one statement of the case, including a summary of the evidence, citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision, the decision on

each issue, and a summary of the reasons for the decision. 38 U.S.C. 5104(b), 7105(d). That information should enable the claimant to identify any missing evidence.

Respondents contend that a VA benefits claimant cannot reasonably be expected to identify the evidence he or she might have submitted had notice been given. But much of the evidence will be in the claimant's possession. Respondents argue that with appropriate notice, a claimant might be better able "to rebut the [VA's] evidence." Sanders Br. 42 (quoting *Daniels* v. *Brown*, 9 Vet. App. 348, 353 (1996)). The VCAA notice, however, is issued *before* the initial decision on a claim. There is no reason, at that stage, for the claimant to attempt to develop evidence to rebut the evidence of record. Indeed, the notice requirement states that VA shall notify the claimant of what evidence he or she is required to provide to VA. 38 U.S.C. 5103(a). It does not require VA to notify a claimant of the information and evidence necessary to rebut a VA decision on a claim. See *Wilson* v. *Mansfield*, 506 F.3d 1055, 1059-1060 (Fed. Cir. 2007); *Hartman* v. *Nicholson*, 483 F.3d 1311, 1314 (Fed. Cir. 2007); *Paralyzed Veterans of Am.* v. *Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003). After the initial decision is issued, the claimant may challenge the decision and is free to submit additional evidence, but the VCAA notice has nothing to do with that process.

b. Respondents suggest (Simmons Br. 28) that the "VA has better access to some facts, such as certain records." The question in a prejudice inquiry, however, is whether, as a result of the defective notice *to the claimant*, existing records that might substantiate the claim were not obtained. And the claimant is in a much better position to answer that question. For example, if the

result of defective notice was that a veteran did not notify the VA of treatment at a VA medical center, then the VA might not obtain the records of that treatment. If the claimant alerts the Veterans Court to that treatment, and thus to the existence of the records, then prejudice will have been demonstrated and a remand would be appropriate. If, even at the appeal stage (and even after having become aware of the notice that should have been given initially), the claimant still says nothing about the treatment, then any remand would be pointless, because the VA would still be unaware of the records and the remand therefore would not lead to a different result.

Respondents attempt to minimize the burden on the VA of the unnecessary remands that the decisions below will necessitate. In their view (Simmons Br. 31), "[t]here is nothing to suggest that presuming prejudice would add substantially to the number of remands." The VA must provide notice under Section 5103(a) with respect to each of the hundreds of thousands of claims for benefits filed each year, however, and even a small increase in the percentage of cases that must be remanded to the agency will therefore have significant practical consequences. Because the content of the required notice varies depending on the specific claim asserted by the veteran, it is often difficult to determine precisely what notice the VCAA requires in any given case. See *Wilson*, 506 F.3d at 1062 (notice "necessarily must be tailored to the specific nature of the veteran's particular claim"); see also *Vazquez-Flores* v. *Peake*, 22 Vet. App. 37 (2008) (VA must provide a general notice of the requirements of the particular diagnostic code for a claimant's disability). As a result, there will be many cases in

which claimants can plausibly assert that a VCAA notice error occurred.

Under the decisions below, each time the Veterans Court finds that a particular type of VCAA notice letter is inadequate, the notice that the VA provided in all similar cases before the court's decision was issued will be treated as presumptively prejudicial to the claimants involved and will likely require a remand. Avoiding those unnecessary remands is not simply a matter of "unburden[ing] the VA" (Simmons Br. 31); rather, it is about unburdening the system for providing benefits to veterans and their families. The resources available for claims adjudication are finite, and the expenditure of those resources on unnecessary remands imposes delay and hardship on other, deserving claimants.

3. Respondent Sanders contends (Br. 43) that a presumption of prejudice is appropriate because the Veterans Court lacks the ability to conduct fact-finding, and a claimant's "subjective knowledge of what he might have submitted with proper notice" is not "a part of the record on appeal." But as the Federal Circuit has explained, the obligation imposed by Section 7261(b)(2) to take account of the rule of prejudicial error "permits the Veterans Court to go outside of the facts as found by the Board to determine whether an error was prejudicial." *Mlechick* v. *Mansfield*, 503 F.3d 1340, 1345 (2007). The requirement that review be confined to the administrative record is "not violated when the Veterans Court makes a determination regarding prejudicial error in the first instance *solely* because Congress has specifically required that court to do so by statute." *Ibid.*

Moreover, making an assessment of prejudice based in part on consideration of material outside the record is consistent with judicial practice in other contexts where

agency decisions are reviewed in the first instance in an appellate court. See, *e.g.*, Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* For example, in reviewing immigration decisions, courts of appeals routinely require an alien to show prejudice from an asserted error in proceedings before the immigration judge. See, *e.g.*, *Shmyhelskyy* v. *Gonzales*, 477 F.3d 474, 482 (7th Cir. 2007) (finding no prejudice from the exclusion of a witness because the alien "has not explained what additional information [the witness] would have provided that would have affected the * * * decision"); *De Sandoval* v. *Attorney General*, 440 F.3d 1276, 1285 (11th Cir. 2006) ("Petitioner fails to show how the additional procedures she demands would have changed the result in her case."); *Ibrahim* v. *Gonzales*, 434 F.3d 1074, 1080-1081 (8th Cir. 2006) (finding no prejudice from the denial of a continuance to allow an alien to obtain an additional document because the alien "has not shown any likelihood that the outcome of the proceedings would have been different" had the document been available); *Morgan* v. *Attorney General*, 432 F.3d 226, 235 (3d Cir. 2005) (finding no prejudice from the denial of a continuance because the alien "has not demonstrated how any evidence she might have found would have affected the outcome of her case"). The courts of appeals are able to assess whether that burden has been met even though they lack the ability to conduct their own fact-finding.

If this Court were to accept respondent's contention that the harmlessness inquiry must be based on the preexisting record alone, a presumption of prejudice from VCAA notice errors would be especially difficult for the VA to rebut (and therefore especially disruptive of agency proceedings). Respondent suggests that the agency could establish, without pointing to evidence out-

side the record, "that a benefit could not have been awarded as a matter of law." Sanders Br. 56 (quoting Pet. App. 14a-15a). A frequent reason for denying benefits, however, is that no evidence exists to support the claim. The record cannot show the nonexistence of such evidence. Taken to its logical conclusion, respondent's argument suggests that VCAA notice errors will *always* be treated as prejudicial, and a remand to the agency will always be required, when the VA's stated rationale for denying the claim was that no evidence (or inadequate evidence) supported it.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

NOVEMBER 2008

AMICUS CURIAE BRIEF

No. 07-1209

In The Supreme Court of the United States

JAMES B. PEAKE, Secretary of Veterans Affairs,

Petitioner,

v.

WOODROW F. SANDERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

BARTON F. STICHMAN
NATIONAL VETERANS LEGAL SERVICES PROGRAM
1600 K St., N.W.
Suite 500
Washington, D.C. 20006

BETH S. BRINKMANN
BRIAN R. MATSUI*
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8784

Counsel for Amici Curiae

**Counsel of Record*

OCTOBER 21, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

BRIEF FOR THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS 1

INTERESTS OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 9

CONGRESS DID NOT IMPOSE ON VETERANS WHO SEEK REVERSAL OF THE DENIAL OF THEIR BENEFITS CLAIMS, A BURDEN TO SHOW THEY WERE PREJUDICED BY THE DEPARTMENT OF VETERANS AFFAIRS' VIOLATION OF ITS STATUTORY DUTY TO NOTIFY AND ASSIST THEM WITH THEIR CLAIMS 9

A. Congress Has Mandated That The VA Notify Veteran Claimants Of What Evidence Is Necessary To Substantiate Their Claims And Who Is To Provide It, And That The VA Assist In Obtaining That Evidence 9

TABLE OF CONTENTS – Continued

Page

B. The Judicial Review Provision In Section 7261(b)(2) Does Not Impose APA Standards And Does Not Require A Veteran Claimant To Prove Prejudice From The VA's Violation Of Its Statutory Duty To Notify And Assist The Veteran 17

C. Congress Did Not Intend Veteran Claimants To Bear A Burden To Prove Prejudice Because Congress Is Well Aware That Veteran Claimants Already Bear The Burden Of Navigating A Difficult And Dysfunctional Claims Process Administered By The Department Of Veterans Affairs..... 22

1. The VA's violation of its duty to notify and assist veterans often thwarts Congress's goal of early claim resolution and provision of benefits to all veterans legally entitled..... 22

2. The Secretary is wrong that the multi-step claim process somehow obviates the prejudice from the VA's violation of its duty to notify and assist veterans..... 25

TABLE OF CONTENTS – Continued

Page

3. Unnecessary remands will not result from a correct statutory interpretation because the VA is capable of demonstrating that its violation of its statutory duty to notify and assist veterans did not prejudice a particular veteran..... 30

CONCLUSION..... 35

TABLE OF AUTHORITIES

Page

CASES:

Daye v. Nicholson, 20 Vet. App. 512 (2006) 26

Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994).....11

General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004).....18, 19

Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998).....14, 17

Hupp v. Nicholson, 21 Vet. App. 342 (2007) 26

Jones v. Nicholson, No. 05-1926, 2007 WL 1302092 (Vet. App. Apr. 20, 2007) 26

King v. St. Vincent's Hospital, 502 U.S. 215 (1991).....19

Mayfield v. Nicholson, 19 Vet. App. 103 (2005).....31

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71 (2006).....18

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).....18

Morton v. West, 12 Vet. App. 477 (1999).....15, 16

Pelegrini v. Principi, 18 Vet. App. 112 (2004) 11

Schaffer v. Weast, 546 U.S. 49 (2005) 11, 21

Short Bear v. Nicholson, 19 Vet. App. 341 (2005).....32

Smith v. Peake, No. 07-0150, 2008 WL 4415941 (Vet. App. Sept. 15, 2008).....26

TABLE OF AUTHORITIES – Continued

Page

Szemraj v. Principi, 357 F.3d 1370 (Fed. Cir. 2004) 14

Tinker v. Midland Valley Mercantile Co., 231 U.S. 681 (1914) 21

United States v. Heirs of Boisdore, 49 U.S. 113 (1849) 19

United States National Bank v. Independent Insurance Agents of America, Inc., 508 U.S. 439 (1993) 19

Vazquez-Flores v. Peake, 22 Vet. App. 37 (2008) 26

Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 14

Young v. Peake, No. 06-1699, 2008 WL 2883713 (Vet. App. July 24, 2008) 27

STATUTES & REGULATIONS:

5 U.S.C. § 706(b) 6, 17, 18, 19, 20

7 U.S.C. § 2023(a)(6) 20

38 U.S.C. § 301(c)(5) 12

Veterans Claims Assistance Act, 38 U.S.C.:

§ 5102(b) 9, 10, 16

§ 5103 21

§ 5103(a) 5, 10, 31

§ 5103A 5, 10, 21

§ 5103A(a) 5, 31

TABLE OF AUTHORITIES – Continued

Page

§ 5103A(a)(2) 10, 16, 33

§ 5103A(b) 5, 31

§ 5103A(c) 10

§ 5103A(d)(1) 10

§ 5107(b) 15

Veterans' Judicial Review Act, 38 U.S.C.:

§ 5904(c)(1) 12

§ 7101 12

§ 7105(a) 11

§ 7105(b) 11

§ 7105(d) 12

§ 7252(a) 12

§ 7261(b)(2) ..... *passim*

§ 7292(c) 12

Social Security Act, 42 U.S.C.:

§ 405(b)(3)(B) 13

§ 1395 *et seq* 20

§ 1395oo(f)(1) 20

Medicare Act, Pub. L. No. 89-97, 79 Stat. 291 (1965) 20

Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) 14

Veterans Claims Assistance Act, Pub. L. No. 106-475, 114 Stat. 2096 (2000) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 (2006) 12

Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008) 13

7 C.F.R. § 273.2(f)(5)(i) 13

Notice & Assistance Requirements & Technical Correction, 73 Fed. Reg. 23353 (Apr. 30, 2008) (to be codified at 38 C.F.R. pt. 3) 33

CONGRESSIONAL AUTHORITIES:

S. 3023, 110th Cong. (2008) 23

S. Rep. No. 106-397 (2000) 11

S. Rep. No. 110-449 (2008) 16, 23, 33

H.R. Rep. No. 100-963 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782 14

H.R. Rep. No. 106-781 (2000) 16

Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before the H.R. Subcommittee on Disability Assistance and Memorial Affairs of the Committee on Veterans' Affairs, 110th Cong. (2007) ..... *passim*

Hearing on FY 2009 Budget for Veterans Programs: S. Committee of Veterans' Affairs, 110th Cong. (Feb. 13, 2008) 17

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

GAO, *Veterans Benefits Administration: Clarity of Letters to Claimants Needs to Be Improved*, GAO-02-395 (April 2002) 22, 27

GAO, *Veterans' Disability Benefits: Claims Processing Challenges Persist, while VA Continues to Take Steps to Address Them*, GAO-08-473T (February 2008).....3, 27

GAO, *Veterans' Disability Benefits: Long-Standing Claims Processing Challenges Persist*, GAO-07-512T (March 2007) 24

Rick Maze, *VA claims found in piles to be shredded*, ARMY TIMES (Oct. 17, 2008).....23

James P. Terry, Board of Veterans' Appeals, *Report of the Chairman*, Fiscal Year 2007 (2007).....*passim*

United States Court of Appeals for Veterans Claims, *Annual Reports* (2007) 27, 28, 30

U.S. Vet. App. R. 28(a).....31

BRIEF FOR THE AMERICAN LEGION, MILITARY ORDER OF THE PURPLE HEART, AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS[1]

The American Legion, Military Order of the Purple Heart, and National Veterans Legal Services Program respectfully submit this brief as *amici curiae* in support of respondents.

INTERESTS OF *AMICI CURIAE*

The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans' organization. It now is a community-service organization with nearly three million members. The American Legion serves military veterans in a myriad of ways. Among the many services it provides are assistance and representation of veterans in matters involving the Department of Veterans Affairs, including help with appeals for veterans' benefits, reporting on the impact on veterans of Department of Veterans Affairs health care policies,

---

[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and assisting severely injured servicemembers with help in transitioning from the military.

The Military Order of the Purple Heart was formed in 1932 for the protection and mutual interest of all who have received the Purple Heart. The Purple Heart is a combat decoration awarded to members of the armed forces of the United States who are wounded by an instrument of war by the hands of the enemy. Composed exclusively of Purple Heart recipients, the Military Order of the Purple Heart is the only veterans' service organization comprised strictly of "combat" veterans. Nonetheless, the Military Order of the Purple Heart Service Program exists to assist all veterans in working with the Department of Veterans Affairs and in filing claims for available benefits. The Military Order of the Purple Heart Service Program has experts on veterans' benefits at various administration regional offices, hospitals, veterans' centers, and state and county veterans' facilities. The Military Order of the Purple Heart Service Program's benefits experts process veterans' claims for compensation, pension, medical care, education, job training, employment, veterans' preferences, and housing, death, and burial benefits.

The National Veterans Legal Services Program is an independent, non-profit, charitable organization that has worked for veterans' rights for more than 25 years. It provides advocacy and training services to help veterans and advocates for veterans navigating the benefits program of the Department of Veterans

Affairs by preparing educational materials and publications, including a comprehensive *Veterans Benefits Manual* and by engaging in and assisting in *pro bono* litigation related to veterans' rights. Since it was founded in 1980, the National Veterans Legal Services Program has directly represented more than 1000 claimants before VA regional offices, the Board of Veterans' Appeals, and the United States Court of Appeals for Veterans Claims. The National Veterans Legal Services Program also frequently submits testimony to Congress regarding the increasingly large number of disabled veterans who require representation for their claims before the Department of Veterans Affairs, and it has been instrumental in the passage of legislation designed to protect the rights of veterans.

As members of the armed forces continue to serve our Nation in wartime conflicts, the number of veterans seeking disability benefits continues to increase at a rapid pace. In fiscal year 2007, the number of initial claims for veterans' disability benefits totaled a staggering 838,000. *See* GAO, *Veterans' Disability Benefits: Claims Processing Challenges Persist, while VA Continues to Take Steps to Address Them*, GAO-08-473T, at 5 (February 2008), *available at* http://www.gao.gov/new.items/d08473t.pdf [hereinafter GAO 2008]. This constitutes a 45% increase from 2000, when 579,000 claims were filed. *Ibid.*

The steady increase in claims for veterans' benefits means that *amici*, which often provide claim assistance from initial filing through the appeals process, have been called upon more than ever to continue their mission to assist disabled servicemembers. *Amici* have repeatedly witnessed first hand how the claim adjudication process works before the Department of Veterans Affairs; the Court's resolution of the instant case will have a profound effect on how the Department discharges its statutory duty to provide notice and assistance to those veterans seeking the benefits Congress granted them.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The administrative system for review of claims for veterans' benefits at the Department of Veterans Affairs (VA) is guided by the principle that a veteran of the Nation's armed services is entitled to all possible assistance to obtain benefits to which he or she is legally entitled. The process established by Congress shares none of the more adversarial characteristics that exist in government entitlement programs such as Social Security.

A critical and unique element of the VA's nonadversarial claims system is the duty of notice and assistance that Congress imposed on the VA in

the Veterans Claims Assistance Act (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000). Through this major renovation of the claims process, Congress requires that the VA provide notice to a veteran, at the outset of the benefits claim process, of "any information, and any medical or lay evidence" that is needed to substantiate the veteran's claim to benefits. 38 U.S.C. § 5103(a). The VA also must notify the veteran of "which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant." Section 5103A specifically imposes on the VA a "duty to assist" veterans with their claims for benefits. The VA must make reasonable efforts to assist a veteran to obtain the evidence necessary to substantiate his or her claim for benefits, including the VA obtaining both private records and government records for the veteran. 38 U.S.C. § 5103A(a), (b).

History has shown that the VA repeatedly violates its statutory duty of notice and assistance. *Amici* have witnessed first hand that the VA often neglects to provide notice of what evidence is necessary to substantiate claims by veterans, and also fails to assist veteran claimants, many of whom make substantial sacrifices for their country in their physical and mental well-being and are legally entitled to the benefits they are attempting to obtain. The Board of Veterans' Appeals repeatedly fails to

reverse decisions by regional VA offices that deny veterans their claims for benefits despite the VA's violation of its own duty of notice and assistance to the veteran.

B. At issue in the instant dispute is whether a veteran claimant must bear the burden of demonstrating on judicial review that he or she was prejudiced by the VA's violation of its duty under the VCAA to notify and assist the veteran to get the evidence to support his or her claim.

Contrary to the Secretary's contention, there is no basis for this Court to look outside of the veterans' benefits laws to the Administrative Procedure Act (APA) and to impose the burdens of the APA administrative framework in the context of the veterans' claims process. Had Congress intended to incorporate APA procedures into the veterans' claims process, Congress would have done so explicitly, as it did for several federal entitlement programs. The Federal Circuit correctly reasoned that, in light of the overall text, structure and purpose of the relevant provisions of the VA statutes, "the rule of prejudicial error" set forth in 38 U.S.C. § 7261(b)(2) to govern review by the Court of Appeals for Veterans Claims must presume prejudice to a veteran claimant for the VA's failure to fulfill its duty to notify and assist veterans.

Requiring a veteran to demonstrate on judicial review a lack of prejudice from the VA's statutory violation, as the Secretary urges, means that a

veteran must prove that he or she had material evidence to present that would have affected the outcome of the proceeding. But the Secretary's construction eviscerates the VA's duty of notice and assistance by requiring the veteran claimant to figure out on his or her own what evidence is necessary to prove the claim to benefits and must somehow obtain that evidence even though such evidence often is in records that the VA either possesses or is more readily equipped to obtain. That is exactly what Congress mandated that the VA do at the outset of the claim process. The rule of prejudicial error in Section 7261(b)(2) cannot bear that reading because, as the Federal Circuit concluded, "interpreting § 7261(b)(2) as requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." Pet. App. 21a.

C. The decision below must be affirmed because a contrary ruling would permit the Department of Veterans Affairs to evade the statutory duty that Congress imposed on the Department to provide notice and assistance to veteran claimants.

Amici recognize that not every veteran's claim will be handled perfectly by the Department of Veterans Affairs. But the track record of the Department of Veterans Affairs is so far from perfect that, during a recent twelve-year period, the United States Court of Appeals for Veterans Claims set aside rulings by the Board of Veterans' Appeals and remanded the case or awarded benefits on appeal in a

staggering 77.7% of the cases that veterans pursued judicial review.

There is no merit to the Secretary's contention that the VA somehow later in the process can correct its failure to provide to a veteran the required notice and assistance. The Secretary points to no evidence that the VA does, in fact, correct its VCAA violations after an initial VA decision denying benefits to a veteran. Indeed, many judicial reversals of claim denials are because of the very issue in this case—*viz.*, that the VA failed to follow the explicit provisions of the VCAA duty to notify and assist veterans seeking benefits.

Moreover, most of the VA's errors, including violations of its duty to notify and assist veteran claimants, go unreviewed. Empirical evidence demonstrates that, absent the statutory notice and assistance from the VA, claims are not fully developed and are often erroneously denied. Veterans are left either to unwittingly abandon the benefits to which, in fact, they are lawfully entitled or to navigate a daunting, sometimes overwhelming, time-consuming appellate review process. More often than not the veteran claimant decides to forgo his or her potential benefits. Data demonstrate that there is no administrative appeal in 90% of all initial decisions by regional VA offices.

ARGUMENT

CONGRESS DID NOT IMPOSE ON VETERANS WHO SEEK REVERSAL OF THE DENIAL OF THEIR BENEFITS CLAIMS, A BURDEN TO SHOW THEY WERE PREJUDICED BY THE DEPARTMENT OF VETERANS AFFAIRS' VIOLATION OF ITS STATUTORY DUTY TO NOTIFY AND ASSIST THEM WITH THEIR CLAIMS

A. Congress Has Mandated That The VA Notify Veteran Claimants Of What Evidence Is Necessary To Substantiate Their Claims And Who Is To Provide It, And That The VA Assist In Obtaining That Evidence

1. Under the VCAA, once a veteran submits an application for "a benefit under the laws administered by the Secretary" of Veterans Affairs, including various claims for education, pension, medical, compensation, and burial benefits, several statutory duties for the VA are triggered.[2] 38 U.S.C. § 5102(b). First, if the application is incomplete, the VA regional office handling the claim does not deny it;

---

[2] Most claims, including those in this case, are for disability compensation connected to the veteran's service in the armed forces. James P. Terry, Board of Veterans' Appeals, *Report of the Chairman*, Fiscal Year 2007, at 19, *available at* http://www.va.gov/Vetapp/ChairRpt/BVA2007AR.pdf [hereinafter Chairman's Report].

instead, the VA is statutorily required to provide the claimant with notice of the "information necessary to complete the application." *Ibid.*

Second, once the application is "complete or substantially complete," the VA must notify the claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." *Id.* § 5103(a). The VA must further notify the veteran as to "which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5013A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant." *Ibid.*

Third, under Section 5103A, the VA must make reasonable efforts to assist the claimant in obtaining substantiating evidence, including private and government records. The Secretary's statutory duty to assist in obtaining the necessary substantiating evidence is obviated only "if no reasonable possibility exists that such assistance would aid in substantiating the claim." *Id.* § 5103A(a)(2). And, for disability compensation claims in particular, Congress stated that the assistance under Section 5103A "shall include" the VA obtaining records specifically listed in the statute, such as service medical records and VA facility records, *id.* § 5103A(c), as well as "a medical examination or obtaining a medical opinion" when necessary to make a decision on the claim, *id.* § 5103A(d)(1). Thus, the

VA is mandated by law to share in the burden of production when a veteran files a claim for benefits. *See Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (explaining that the burden of production means the "party bears the obligation to come forward with the evidence at different points in the proceeding," and is distinct from the burden of persuasion) (citing *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)).

This duty of notification and assistance that Congress imposed on the VA in the benefits claims process, including the sharing of the burden of production, is structured to help ensure that claims by veterans are fully developed at the initial time of filing before the VA regional office. *See* S. Rep. No. 106-397, at 22 (2000); *Pelegrini v. Principi*, 18 Vet. App. 112, 119-120 (2004) (noting that these statutory requirements "mandate that notice precede an initial" decision). The VA's obligation to provide notice to the claimant of required evidence and who is to provide the evidence also helps ensure that the veteran understands *before* the initial adjudication of his or her claim by the regional office, what evidence the VA will obtain and what the veteran is supposed to provide.[3]

---

[3] If a veteran is dissatisfied with the initial decision by the regional office, the veteran must submit a Notice of Disagreement (NOD). 38 U.S.C. § 7105(a)-(b). Upon receipt of an NOD, the VA office handling the claim must prepare a Statement of the Case, which summarizes the basis for its initial

(Continued on following page)

The VA's duty to notify and assist veteran claimants is especially important because veterans are prohibited from retaining counsel to represent them for their initial administrative claim filing. 38 U.S.C. § 5904(c)(1) (allowing only *pro bono* representation and not paid counsel for filing of initial claim for benefits by veteran). Veterans can retain counsel to represent them only upon an administrative appeal. *Ibid.* And that permission for a veteran to hire and fully pay an attorney or non-attorney representative to handle an administrative appeal in most circumstances, was not allowed until 2007. *See* Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403, 3405-3409 (2006). Even with the right to private counsel on administrative appeal, most veterans are not represented by retained attorneys. *See* Chairman's Report at 20 (noting that only 2% of appeals to the Board of Veterans' Appeals in fiscal year 2007 were handled by private attorneys). Veterans usually rely on veterans' service organizations, such as *amici*, to provide assistance. Such organizations represented over 80% of the

---

decision. *Id.* § 7105(d). When such an adverse initial decision is appealed to the Board of Veterans' Appeals, the Board reviews the claim *de novo*. *See* 38 U.S.C. §§ 301(c)(5), 7101 *et seq.* The United States Court of Appeals for Veterans Claims has jurisdiction over appeals of Board decisions, *see* 38 U.S.C. § 7252(a), and then the Federal Circuit has jurisdiction over those rulings by the Veterans Claims court. *See* 38 U.S.C. § 7292(c).

claimants during fiscal year 2007. *Ibid.* That staggering number of appeals has the potential to overextend *amici*'s resources as claims continue to increase.

This VA benefits claims process is unlike the adversarial process in general government entitlement programs. For example, regulations promulgated pursuant to the federal Food Stamp Program, recently renamed the Supplemental Nutrition Assistance Program, *see* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008), provide that, although a state agency will "assist" a household with an application, it is the filer that "has primary responsibility for providing documentary evidence" supporting an application. 7 C.F.R. § 273.2(f)(5)(i). As for the Social Security Act, the only mention of notice that is remotely comparable to the VA notice requirements deals with providing clear concise notice of a denial of benefits. *See* 42 U.S.C. § 405(b)(3)(B). The Social Security Act does not contemplate, let alone specifically mandate, a collaborative effort between the agency and the claimant as the VA claims process does. Although the Social Security Administration will develop a claimant's relevant medical history prior to an initial determination, regulations do not provide for a more intensive role for the agency to ensure that all available evidence is reviewed, as the VA process is structured to do.

2. Congress thus created in the VCAA an administrative scheme that relieves a veteran claimant of much of the initial burden to produce the evidence to substantiate his or her claim. And it is the duty of the VA to make sure, before the VA is relieved of its duty to assist a veteran, that there is no basis for the claim. *See Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (explaining that the VA must "give a sympathetic reading" to veterans' filings and consider all potential claims regardless of whether raised by the veteran).

This comes as no accident. Since the VA was established as an independent agency in 1930, Congress has explicitly refused to adopt for veteran claims "the adversary mode of dispute resolution utilized by courts in this country," and instead has maintained an administrative benefits claim system "with a high degree of informality and solicitude for the claimant." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309-311 (1985). Indeed, when Congress created the first judicial review provision for veteran claimants under the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), Congress emphasized that the system was "a beneficial non-adversarial system of veterans benefits" in which the VA "fully and sympathetically develop[s] the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795; *see also Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("even in creating judicial review in the

veterans context, Congress intended to preserve the historic, pro-claimant system").

Congress further made clear the broad reading that the VA must give to veteran claims when Congress provided that the Secretary must give the veteran the benefit of the doubt on disputed material issues that are in equipoise. Congress directed that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

Moreover, Congress's imposition of the duty on the VA of notice and assistance in its November 2000 enactment of the VCAA was partially in response to the decision by the United States Court of Appeals for Veterans Claims in *Morton v. West*, 12 Vet. App. 477 (1999). *Morton* required a veteran to first prove that his or her claim was "well grounded" before the VA would assist in the development of the claim for an initial adjudication. *Id.* at 485. The *Morton* ruling imposed upon the veteran claimant the initial burden to demonstrate, in effect, a *prima facie* case for benefits.

Congress responded to *Morton* by rejecting in the VCAA the imposition of any such burden on veterans to make a *prima facie* case. As noted above, under the VCAA, if a veteran files an incomplete claim, the VA cannot deny it on those grounds, but rather must notify the veteran of the information necessary

to complete it. 38 U.S.C. § 5102(b). And the VA's duty to notify or assist in obtaining evidence does not contain any *prima facie Morton* requirement. The VA must assist in obtaining evidence unless "no reasonable possibility exists" that the VA assistance would help to substantiate the claim. *Id.* § 5103A(a)(2).

3. The Secretary is wrong that the VCAA "was not intended to change the VA's practice." Pet. Br. 20. The House and Senate Reports accompanying the legislation specified that the provisions in the VCAA regarding the VA's duty of notice and assistance would "substantially revise" pre-existing laws, H.R. Rep. No. 106-781, at 9 (2000), and "clarified and expanded [the] VA's duty to assist claimants," S. Rep. No. 110-449, at 7 (2008).

The Secretary's attempt to minimize the significance of the VCAA is belied by the Secretary's testimony before Congress earlier this year. As part of the budgetary process, the Secretary has not hesitated to invoke the VCAA's requirements of VA notice and assistance as a basis for the VA's need for federal funding. The Secretary testified before the Senate Committee on Veterans' Affairs as follows:

> The Veterans Claims Assistance Act of 2000 has significantly increased both the length and complexity of claims development. VA's notification and development duties have grown, adding more steps to the claims process and lengthening the time it takes to develop and decide a claim. Also, the

> Department is now required to review the claims at more points in the adjudication process.

Hearing on FY 2009 Budget for Veterans Programs: S. Comm. of Veterans' Affairs, 110th Cong. (Feb. 13, 2008), *available at* http://veterans.senate.gov/public/index.cfm?pageid=16&release_id=11506&sub_release_id=11537&view=all (Statement of James B. Peake, Secretary of Veterans Affairs).[4]

B. The Judicial Review Provision In Section 7261(b)(2) Does Not Impose APA Standards And Does Not Require A Veteran Claimant To Prove Prejudice From The VA's Violation Of Its Statutory Duty To Notify And Assist The Veteran

1. The Secretary's position in this case would undermine the core purpose of Congress in enacting the unusual nonadversarial, pro-claimant statutory scheme for veteran benefits claims. The Secretary would construe the "prejudicial error" provision in

---

[4] Even if the effects of the VCAA were "restorative," as the Secretary contends, *see* Pet. Br. 21, it would not diminish the statutory duty imposed on the VA because under the earlier statutory scheme, the VA bore a significant portion of the burden of production and the veterans' benefits system, including the VJRA and its judicial review provisions, were interpreted in a pro-claimant manner. *See Hodge v. West*, 155 F.3d 1356, 1362 1363 (Fed. Cir. 1998) (noting, prior to the VCAA's enactment, that the veterans' benefits system and its accompanying judicial review provisions, are pro-claimant).

38 U.S.C. § 7261(b)(2) to require the same construction as the prejudicial error standard found in the Administrative Procedure Act (APA), 5 U.S.C. § 706(b). Pet. Br. 11-14. But the Secretary's interpretation of Section 7261(b)(2) ignores the structure and purpose of the veterans claims process created by Congress, which is different from the structure and purpose of the APA.

The fact that Section 7261(b)(2) uses the language of "prejudicial error" which is also used in the APA does not require that the language be given the same meaning in the two statutory provisions. Even within the same statute, the presumption of identical interpretation of the same term "is not rigid and readily yields" when words are used "with [a] different intent." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595-597 & 595 n.8 (2004) (citation omitted).[5] Certainly, when Congress uses a term in two different statutes enacted at different times with different purposes such as here, there is

---

[5] According the statutory context its proper weight in its own statutory context disposes of the government's reliance on *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006), which indicates that a settled judicial interpretation of a statutory provision will, "as a general matter," apply to that language in a new statute, *id.* at 85-86, because a different intent or purpose in a subsequent specific statutory scheme trumps such a general proposition. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

no requirement that the term be used to mean the exact same thing. *Id.* at 595 n.8.

Furthermore, the Secretary's interpretation of the VCAA and Section 7261(b)(2) cannot be reconciled with "the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (internal citations omitted); *see also United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)).

Section 7261(b)(2) is included in the statutory provision that governs the scope of review of decisions of the Board of Veterans' Appeals by the United States Court of Appeals for Veterans Claims. It states that when the court reviews the record that was before the VA and the Board of Veterans' Appeals, the court must "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2). That text must be interpreted in light of the rest of the overall statutory scheme for determination of veterans' benefits claims, with which it interacts, in particular the numerous obligations that the VCAA imposes *on the VA* rather than on the veteran claimant. It does not follow that APA standards of review apply.

Congress elsewhere has made clear when it intends for APA review to govern particular benefit programs. When Congress enacted the Medicare Act, established under Title XVIII of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 291 (1965), codified as amended at 42 U.S.C. § 1395 *et seq.*, it explicitly provided for APA review of a decision denying provider reimbursement for a Medicare claim by stating that judicial review would be had in federal district court and the matter "tried pursuant to the applicable provisions under chapter 7 of title 5," with chapter 7 being the judicial review provisions of the APA. *See* 42 U.S.C. § 1395oo(f)(1). Similarly, when an institution's application to participate in the Food Stamp Program is denied, the statute explicitly provides for "opportunity for an agency hearing in accordance with section 556 and 557 of title 5," which is where the APA administrative hearing process is set out. 7 U.S.C. § 2023(a)(6).

2. The Secretary's interpretation of the VCAA and Section 7261(b)(2) makes no sense. Under that interpretation, a veteran denied benefits by the VA must demonstrate that he was prejudiced by the VA's violation of its duty of notice and assistance and, to do so, the veteran must prove that he or she had material evidence to present that would have affected the outcome of the benefits claims proceeding. Pet. Br. 29, 37. But such a rule eviscerates the VA's duty of notice and assistance because the veteran is being given a burden that Congress rejected--the veteran must attempt to figure out what evidence is

necessary to prove his claim and must somehow obtain that evidence even though it is often in records that the VA either possesses or is more readily equipped to obtain. That is exactly what Congress mandated that the VA do at the outset of the claim process. The Secretary cannot turn the VCAA on its head and impose that mandate on the veteran at the judicial review stage when the VA has failed to fulfill that duty at the initial claim stage.

3. This Court's jurisprudence on burden of production and persuasion further undermines the Secretary's interpretation. Although the burden of proof (both production and persuasion) is often imposed upon the party seeking relief, *see Schaffer*, 546 U.S. at 57, Congress has mandated in the VCAA that those ordinary principles do not apply. Congress in the VCAA imposed the burden on the party that "occupie[s] the position of advantage," *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682-683 (1914) (Holmes, J.), which unquestionably is the VA. Congress explicitly recognized in the VCAA that the VA is in the better position to substantiate a veteran's claim with the necessary evidence. *See* 38 U.S.C. §§ 5103-5103A.

C. Congress Did Not Intend Veteran Claimants To Bear A Burden To Prove Prejudice Because Congress Is Well Aware That Veteran Claimants Already Bear The Burden Of Navigating A Difficult And Dysfunctional Claims Process Administered By The Department Of Veterans Affairs

1. The VA's violation of its duty to notify and assist veterans often thwarts Congress's goal of early claim resolution and provision of benefits to all veterans legally entitled

The VA has consistently failed to provide the requisite notice and assistance to veterans that it is mandated to provide under the VCAA. That has had a disastrous effect on veteran claimants and undermined Congress's intent that the claims process for veterans be prompt and straightforward. In 2002, the GAO reported that VA notices to veterans about their claims for benefits "explained some, but not all, of the key aspects that the claimants needed to understand." GAO, *Veterans Benefits Administration: Clarity of Letters to Claimants Needs to Be Improved*, GAO-02-395, at 7 (April 2002), *available at* http://www.gao.gov/new.items/d02395.pdf [hereinafter GAO 2002]. The GAO found that "[a]bout 43 percent" of the letters aimed at developing a claim for a veteran claimant "did not clearly explain the actions the claimant should take." *Id.* at 21. *Amici* have witnessed first hand numerous instances where

veterans were not even notified about readily-available information that could win their cases.

The Senate recently enacted the Veterans' Benefits Improvement Act of 2008 to attempt to improve the notifications that the VA provides to veterans. *See* S. 3023, 110th Cong. § 101 (2008) (requiring the VA to promulgate regulations that would clarify notification letters, though not adequately addressing shortcomings in the VA's duty to assist). The Senate Report accompanying the legislation explicitly concluded that notices "are not meeting the goal of providing claimants with sufficient, clear information on which they can then act." S. Rep. No. 110-449, at 7 (2008). The report notes that a congressional staff member recently conducted oversight visits to 19 different VA regional offices and found that VCAA letters "provide little practical assistance" to veterans. S. Rep. No. 110-449, at 7 (2008). "In many of the claims examined, information that would have been helpful in substantiating the claim was missing. However, the files did not indicate that VA had requested the missing information." *Id.* at 7-8. Moreover, recent news reports have documented VA shortcomings in its claims' handling process. *See* Rick Maze, *VA claims found in piles to be shredded*, ARMY TIMES (Oct. 17, 2008), *available at* http://www.armytimes.com/news/2008/10/military_va_stopshredding_101608w/.

The VA cannot claim insufficient time to meet its duty to notify and assist veterans filing claims. In the

instant case, for example, the VA had respondent Sanders's initial claim for nearly 3 years before denying it. Pet. App. 25a-27a.

One of the reasons that the VA so often fails to provide adequate notice and assistance is because it is plagued by an inefficient field structure, which is comprised of 57 regional offices that "experience large performance variations and questions about decision consistency." GAO, *Veterans' Disability Benefits: Long-Standing Claims Processing Challenges Persist*, GAO-07-512T, at 10-11 (March 2007), *available at* http://www.gao.gov/new.items.d07512t.pdf.

Inadequate training at the VA regional offices also accounts for substandard treatment of veterans' claims. Fifty percent of claim processors think they are ill-equipped to perform their jobs and over 80% of them criticize the system for placing too much weight on speed rather than accuracy. *See Board of Veterans' Appeals Adjudication Process and the Appeals Management Center: Hearing Before the H.R. Subcomm. on Disability Assistance and Memorial Affairs of the Comm. on Veterans' Affairs*, 110th Cong., at 2 (2007) [hereinafter Subcomm. Hearing] (statement of Chairman Hall); *see also id.* at 5 (statement of Barton F. Stichman, Joint Executive Director, National Veterans Legal Services Program [hereinafter Stichman statement]) ("part of the reason for the problems is the pressure put on [the VA system] * * * to decide cases quickly").

2. The Secretary is wrong that the multi-step claim process somehow obviates the prejudice from the VA's violation of its duty to notify and assist veterans

a. The Secretary's response to the VA's violation of its statutory duty to notify and assist veterans with the filing of their claims for benefits is to point to later places in the administrative claims process where the lack of notice or assistance might be corrected. *See* Pet. Br. at 31-34. The Secretary relies heavily on the notion that the "multi-step process provides multiple opportunities for a claimant to obtain necessary evidence and learn of any deficiencies in his or her case." *Id.* at 31-32. The Secretary then takes the illogical jump to conclude that an insufficient initial notice is not prejudicial.

Neither of the respondents in the cases before this Court received sufficient assistance from the VA before the VA issued its initial denial of the claim. Both respondents were forced to endure a lengthy appellate process before receiving the assistance from the VA in obtaining evidence for their claims. For example, although the VA provided respondent Sanders "with two ophthalmological examinations" to develop evidence, *id.* at 32, Sanders did not receive these examinations until 9 years after he filed his

initial claim. Pet. App. 25a-29a. Similarly, the audiological examinations afforded to respondent Simmons to help develop evidence for her claim were scheduled after a wait of 4 years. Pet. App. 69a-70a.[6]

Moreover, even if a *post hoc* process were sufficient to excuse an initial failure to notify or assist a veteran, it is far from clear that the VA fulfills its statutory duty at any later point. For example, the United States Court of Appeals for Veterans Claims has remanded cases because of the failure of the VA, through the Board of Veterans' Appeals, *inter alia*, to provide a hearing,[7] to provide an adequate statement of reasons for denying a claim,[8] and

---

[6] Even after waiting 4 years to receive these examinations, the court of appeals found "clear evidence" that Simmons was not given notice of the scheduled examination because of the VA's failure to properly address its letter. Pet. App. 74a-76a.

[7] *See, e.g., Smith v. Peake*, No. 07-0150, 2008 WL 4415941, at *2 (Vet. App. Sept. 15, 2008) (holding that the Board failed to fulfill its duties by not providing a hearing to an imprisoned veteran); *Jones v. Nicholson*, No. 05-1926, 2007 WL 1302092, at *2 (Vet. App. Apr. 20, 2007) (explaining that the Board did not comply with regulatory hearing requirements because it failed to properly notify the claimant of a hearing).

[8] *See, e.g., Vazquez-Flores v. Peake*, 22 Vet. App. 37, 48-50 (2008) (remanding to the Board due to a failure to provide adequate notice or an adequate statement of the case explaining the reasons for denial); *Hupp v. Nicholson*, 21 Vet. App. 342, 356 (2007) (noting that the Board failed to provide to the veteran an adequate statement of reasons or bases for its denial); *Daye v. Nicholson*, 20 Vet. App. 512, 517 (2006) (explaining that "in addition to failing to fulfill its heightened duty to assist, the Board also erred in failing to fulfill its concomitant duty to provide a thorough statement of reasons or bases").

to properly consider new evidence for a reopened claim.[9]

b. The Secretary's reliance on the multi-step process also inaccurately assumes that every denied claim is appealed. The VA's violation of its duty to notify and assist veterans leads to a contrary phenomenon. Unclear notifications from the VA to veterans about their benefit claims "confuse and frustrate" the veterans, which discourages them from "pursu[ing] benefits to which they are entitled." GAO 2002, at 8; *id.* at 28.

Indeed, "[a] lot of veterans with erroneous decisions don't bother to appeal. They give up. They have been pursuing their claim for years." Subcomm. Hearing at 5 (Stichman statement).

In fiscal year 2007, only 40,401 cases were decided by the Board of Veteran Appeals, *see* Chairman's Report at 20, even though there were 838,000 initial claims filed during that period, *see* GAO 2008, at 5. Moreover, only 4,644 cases were appealed to the Court of Appeals for Veterans Claims during 2007. *See* United States Court of Appeals for Veterans Claims, *Annual Reports*, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf [hereinafter 2007 Annual Report].

---

[9] *See, e.g.*, *Young v. Peake*, No. 06-1699, 2008 WL 2883713, at *1 (Vet. App. July 24, 2008) (remanding a case because the Board did not properly handle new evidence submitted to reopen a previously denied claim).

c. Even for those veterans who have the tenacity to appeal a claim denial, the VA appellate process is fraught with difficulties. *See* Subcomm. Hearing at 1 (statement of Chairman Hall) ("appealing an [initial] decision presents many challenges to our veterans").

In fiscal year 2007, the Board of Veterans' Appeals had a backlog of more than 40,000 cases and it took an average of more than 800 days from the time of filing for a claimant to receive a decision on an administrative appeal to the Board. *See* Chairman's Report at 14, 16. This delay is in addition to the more than 200 days that a claim spends at the VA regional office after being denied. *Id.* at 16. The Board orders a remand in 35% of the appeals which means further delay. *Id.* at 19. In sum, a veteran must wait an average of more than 3 years before potentially receiving benefits to which he or she was entitled at the time the claim was denied, and, of course, many claims are still incorrectly denied by the Board and are not reversed until the veteran seeks judicial review. *See* Subcomm. Hearing at 5 (Stichman statement) (explaining that over the 12 years leading up to fiscal year 2007 the Board's decisions were set aside 77% of the time).

If a veteran appeals the Board's decision to the Court of Appeals for Veterans Claims, there is an average of an additional 416 days for a final decision. 2007 Annual Report. This totals between 4 to 5 years before a veteran has a chance of receiving the benefits to which he or she is entitled.

The VA has sought to remedy this backlog by eliminating "avoidable remands" by the Board. Chairman's Report at 3. One such way the Board determines if a remand is necessary is by conducting a prejudicial error analysis of any alleged violation by the VA of its duty to notify and assist the veteran claimant. *Id.* at 4. If the Board determines that no prejudice resulted, it issues a final decision notwithstanding the notice error. *Ibid.* This approach by the VA suggests that the VCAA notice provisions are viewed "by the VA as a procedural hardship" rather than as the crucial element of the claims process that they are. *Id.* at 19 (statement of Richard Cohen, President, National Organization of Veterans Advocates, Inc.) (explaining that the duty to notify is "the essence of the case").

The review by the VA only for prejudice directly contravenes the VCAA mandate that veterans are entitled to have the VA provide them notice of what evidence they need to substantiate their claim and assistance from the VA in obtaining that evidence. In addition, rather than solving the backlog problem, this campaign "contribute[s] to the Board's poor performance by encouraging the Board to make a final decision on a case that should be remanded." Subcomm. Hearing at 6 (Stichman statement).

Moreover, of the merits decisions appealed to the Board of Veterans' Appeals in fiscal year 2007, the Board denied benefits in 66% of the cases it decided on the merits. Chairman's Report at 19. If most of these decisions were correct, then such a high denial

rate would not cause immediate alarm. However, during that same period, the Court of Appeals for Veterans Claims affirmed in only 34% of the cases appealed from the Board that it decided on the merits. 2007 Annual Report. Remarkably, this represented an improvement over the previous twelve years, where the Board of Veterans' Appeals was reversed over 77% of the time. *See* Subcomm. Hearing at 5 (Stichman statement).

By no measure does this system reflect Congress's intent to create an efficient and pro-claimant benefits claim process for those men and women who have risked their lives for our country. Congress, which is well aware of the dysfunctional nature of the VA appeals process, simply would not have imposed on top of all this a prejudicial error rule that gives the benefit of the doubt to the VA *after* it has been found to have violated its statutory duty to notify and assist the veteran claimant.

3. Unnecessary remands will not result from a correct statutory interpretation because the VA is capable of demonstrating that its violation of its statutory duty to notify and assist veterans did not prejudice a particular veteran

Even under the ruling below, it goes without saying that a veteran claimant bears the burden to demonstrate that the VA's notice or assistance was deficient in order for the claimant to be entitled to

any relief for a violation of the VCAA. *See Mayfield v. Nicholson*, 19 Vet. App. 103, 111 (2005) ("the appellant bears the burden of demonstrating specifically in what respects the particular notice documents are noncompliant in terms of the purposes sought to be achieved by the notice requirements"); U.S. Vet. App. R. 28(a).

But, once a veteran claimant establishes that the VA did not meet its statutory duty to provide him or her notice, at the outset of the benefits claim process, of "any information, and any medical or lay evidence" that is needed to substantiate the veteran's claim to benefits, 38 U.S.C. § 5103(a), or did not meet its duty to notify the veteran of "which portion of that information and evidence" is to be provided by the claimant and which by the Secretary, *ibid.*, or did not meet its duty to obtain for the veteran certain private or government records, 38 U.S.C. § 5103A(a), (b), prejudice to the veteran in pursuing his or her claim for benefits must be presumed. The Federal Circuit correctly reasoned that, in light of the overall text, structure, and purpose of the relevant provisions of the VA statutes, such prejudice is presumed, and "the rule of prejudicial error" set forth in 38 U.S.C. § 7261(b)(2) to govern review by the Court of Appeals for Veterans Claims must be so construed.

The Secretary is wrong that it would be "difficult," *see* Pet. Br. at 31, for the VA to overcome the presumption of prejudice if the error was truly not prejudicial to the veteran. As the court below found, the presumption could be overcome by the VA

demonstrating "(1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." Pet. App. 12a.

It is not accurate to state, as the Secretary does, that the VA will likely have no information about a claimant's actual knowledge. *See* Pet. Br. at 35. For example, in *Short Bear v. Nicholson*, 19 Vet. App. 341 (2005), the veteran appealed her denial of benefits claiming that the VA's notice failed to inform her of the requirements for her claim. Despite the erroneous VA notice, the court held that the error was not prejudicial because the claimant had actual knowledge of the claim requirements through "information * * * provided on the claim form" itself. *Short Bear*, 19 Vet. App. at 344. Indeed, the Secretary acknowledges that claimants "may already be aware, through means other than a VCAA notice, of the types of evidence needed to substantiate his or her claim." Pet. Br. at 30.

There is no reason to believe that it will be difficult for the VA to demonstrate that a particular veteran had actual knowledge of the evidence necessary to substantiate his or her claim. The Secretary stresses that there is "a dialogue between the claimant and the VA that continues throughout the development" of the claim. *Id.* at 31. This dialogue should ensure that the veteran is fully apprised of the requirements for his or her claim and

that there is no VA violation of its VCAA duty of notice and assistance. But if an appeal does occur and such a violation is shown, actual knowledge on the part of the veteran, if there is such knowledge, could likely be gleaned from the records of these interactions.

Finally, the VA can overcome the presumption that its violation of its duty to notify and assist a particular veteran prejudiced that veteran by demonstrating either that it was unreasonable for the veteran not to understand what was needed, or that no prejudice occurred because the claimed benefit could not have been awarded as a matter of law. The VA can rebut the presumption of prejudice to a veteran by demonstrating that the veteran's claim had no reasonable possibility of being substantiated because Congress provided that the VA need not provide assistance to a veteran if there is no reasonable probability that a veteran can succeed on his or her claim. 38 U.S.C. § 5103A(a)(2); *see also*, *e.g.*, S. Rep. No. 110-449, at 10 (detailing claims for which there existed no duty to assist since there was no reasonable possibility of substantiation), Notice & Assistance Requirements & Technical Correction, 73 Fed. Reg. 23353, 23354 (Apr. 30, 2008) (to be codified at 38 C.F.R. pt. 3) ("the section 5103(a) notice duty does not arise when the claimant is not entitled to the claimed benefit as a matter of law").

This correct interpretation of the statute that places the burden on the VA to establish that its violation of its duty to notify and assist veterans did

not prejudice a particular veteran seeking benefits will not "lead to unnecessary remands that would delay the resolution of meritorious claims." *See* Pet. Br. at 31. This argument overlooks the critical fact that it is the VA's violation of its statutory duty to notify and assist veterans that is a significant cause of remands by the Board of Veterans' Appeals.

That is because the VA's duty to notify and assist is not a mere procedural formality. This duty goes to the very accuracy of the claim determination. When the VA fulfills its duty to the veteran of notice and assistance, the claim is processed based on more complete and more accurate information. And less remands would result. The chairman of the Board of Veterans' Appeals has noted that the VA's violation of its duty to notify and assist claimants is one of the most common reasons for remands. Chairman's Report at 3. *Amicus* has testified similarly, explaining that inadequate initial notices from the VA mean that all of the information necessary for a fair determination of a claim is not obtained and that leads to unnecessary appeals and remands. Subcomm. Hearing at 20 (Stichman statement).

On the other hand, the VA's fulfillment of its duty to veterans to notify them of what evidence is necessary to substantiate their claims, to notify them of which part of that evidence the veteran must provide and which part the VA will obtain, and to assist the veteran in obtaining private and government records to substantiate the claim would obviously lead to fewer remands because both the

grant and denial of benefits would be based on more fully developed records.

CONCLUSION

For the reasons set forth above and in respondents' briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

BARTON F. STICHMAN
NATIONAL VETERANS
LEGAL SERVICES PROGRAM
1600 K St., N.W.
Suite 500
Washington, D.C. 20006

BETH S. BRINKMANN
BRIAN R. MATSUI*
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8784

Counsel for Amici Curiae

**Counsel of Record*

OCTOBER 21, 2008

AMICUS CURIAE BRIEF

OCT 2 1 2008
OFFICE OF THE CLERK

No. 07-1209

In The Supreme Court of the United States

JAMES B. PEAKE, M.D.,

Petitioner,

v.

WOODROW F. SANDERS,

PATRICIA D. SIMMONS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

Daniel Graham
Member, Veterans Appeals Committee of the Federal Circuit Bar Association
WILEY REIN, LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7433

Attorneys for Amicus Curiae Federal Circuit Bar Assn.

Blair Elizabeth Taylor*
Chair, Veterans Appeals Committee of the Federal Circuit Bar Association
COVINGTON & BURLING, LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004
Telephone: (202) 762-5669

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. NOTICE REQUIRED BY THE VCAA IS A CRITICAL COMPONENT OF THE UNIQUELY PRO-CLAIMANT VETERANS BENEFIT REGIME 5

II. THE UNIQUE NATURE OF VETERANS BENEFITS NECESSIATES FLEXIBLE INTERPRETATION OF 38 U.S.C. § 7261(B)(2) 11

A. The Veterans Court Misapplied 38 U.S.C. § 7261(B)(2) In View of the APA, Frustrating the Purpose of the VCAA 13

B. General APA Precedent Should Not Bind Veterans Law Determinations 16

C. The Rule of Prejudicial Error Should Be Applied Flexibly to Veterans Law 19

III. THE FEDERAL CIRCUIT'S PRESUMPTION OF PREJUDICE TAKES "DUE ACCOUNT" OF THE RULE OF PREJUDICIAL ERROR IN THE UNIQUE CONTEXT OF VCAA NOTICE ERRORS 21

A. Requiring Veterans to Prove Prejudice Would Undermine the Nonadversarial Nature of the Veterans Benefits System .. 21

B. The Federal Circuit Properly Required the Government to Prove Harmlessness Because VCAA Notice Errors Have the Natural Effect of Prejudicing Veterans' Substantial Rights 25

C. The Rebuttable Presumption Established by the Federal Circuit Takes Due Account of the Rule of Prejudicial Error 32

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Bonhomme v. Nicholson,
21 Vet. App. 40 (2007) 24

Brown v. Gardner,
513 U.S. 115 (1994) 20

Conway v. Principi,
353 F.3d 1369 (Fed. Cir. 2004) 14

Cook v. Principi,
318 F.3d 1334 (Fed. Cir. 2003) 27

Dickinson v. Zurko,
527 U.S. 150 (1999) 16, 18

Environmental Defense Fund v. EPA,
852 F.2d 1316 (D.C. Cir. 1988) 13, 21

FCC v. Pottsville Broad. Co.,
309 U.S. 134 (1940) 28, 29

Fitz v. Peake,
No. 05-3464, 2008 WL 2128227 at **3-4
(Vet. App. Feb. 21, 2008) 32

Hensley v. West,
212 F.3d 1255 (Fed. Cir. 2000) 6

Hewlett-Packard Co. v. Bausch & Lomb, Inc.,
116 F.R.D. 533 (N.D. Cal. 1987) 17

Kelly v. Nicholson,
463 F.3d 1349 (Fed. Cir. 2006) 28

Kotteakos v. United States,
328 U.S. 750 (1946) 25, 26, 29

Mayfield v. Nicholson,
19 Vet. App. 103 (2005) 12, 14, 31

Mathews v. Eldridge,
424 U.S. 319 (1976) 30

Mlechick v. Peake,
503 F.3d 1340 (Fed. Cir. 2007) 24

Morrison Knudsen Corp. v. Fireman's Fund
Ins. Co., 175 F.3d 1221 (10th Cir. 1999) 29

Morton v. West,
12 Vet. App. 477 (1999) 7

O'Neal v. McAninch,
513 U.S. App. 432 (1995) 25, 26

Palmer v. Hoffman,
318 U.S. 109 (1943) 16

Salvania v. Peake,
No. 05-2116, 2008 WL 1959467 at **3-4
(Vet. App. May 6, 2008) 32

Sanders v. Nicholson,
20 Vet. App. 143 (2005)..... passim

Sanders v. Nicholson,
487 F.3d 881 (Fed. Cir. 2007)..... passim

Strock v. Peake,
No. 05-3560, 2008 WL 566394 at **2-3
(Vet. App. Feb. 7, 2008) 32

Walters v. Nat'l Assn. Radiation Survivors,
473 U.S. 305 (1985) 22, 23

STATUTES AND REGULATIONS

Veterans Claims Assistance Act of 2000,
Pub. L. No. 106-475, 114 Stat. 2096..... 2

5 U.S.C. § 559 (2007)..... 18

5 U.S.C. § 706 (2007) 4, 12

38 U.S.C. § 5103 (2006) 2, 3

38 U.S.C. § 5103A (2006) 3, 28

38 U.S.C. § 7252 (b)(2)
(Supp. V 2005) 23-24, 29

38 U.S.C. § 7261 (b)(2)
(Supp. V 2005) 4, 24, 29

38 C.F.R. § 3.159(b)(1) (2008) 14

38 C.F.R. § 4.1 (2008) 27

MISCELLANEOUS

146 CONG. REC. 22,886-91
(Oct. 17, 2000) 6, 9, 10, 11, 13, 30

146 CONG. REC. 19,229 (Sept. 25, 2000) 17

146 CONG. REC. 16,053 (July 25, 2000) 20

S. REP. NO. 100-481 (1988) 32

H.R. REP. NO. 106-781 (2000) 6, 30

H.R. REP. NO. 100-963 (1988) 32

71 FED. REG. 63,732-33
(Oct. 31, 2006) 8, 30, 31, 33

3 Charles H. Koch, ADMINISTRATIVE LAW AND PRACTICE § 12.34[4] (2d ed. 1997) 12

J. Michael Strickland, Comments on Proposed Changes to Information Disclosure Requirements and Other Related Matters 4 (September 8, 2006) 17

Abraham Lincoln, Second Inaugural Address, in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler, ed., 1953) 19, 26

BRIEF FOR AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

THE INTEREST OF *AMICUS CURIAE*

The Federal Circuit Bar Association ("Association") respectfully submits this brief as amicus curiae in support of the veteran Respondents.[1]

The Association is a well-respected bar organization, drawing its membership from government, industry and private practice attorneys whose expertise falls within the jurisdiction of the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). The Association and its members share a substantial interest in the adjudication of significant issues defining the laws interpreted by the Federal Circuit. The case at bar presents such an important issue, specifically the criteria for applying the "rule of prejudicial error" in the context of veterans law. This issue is highly important to our veterans and their families seeking

---

[1] This amicus curiae brief is presented by the Federal Circuit Bar Association under Supreme Court Rule 37.3(a). The parties have consented to the filing of this amicus curiae brief. The letters of consent from the parties are filed herewith. In accordance with Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored any part of this brief. Only this amicus curiae made a monetary contribution to the preparation and submission of this brief. Counsel for amicus curiae prepared this brief on a pro bono basis.

fair and efficient adjudication of their claims for benefits. The Association seeks to assist the Court by identifying legislative and practical factors that may influence its consideration of precedent when applying the "rule of prejudicial error" in view of 38 U.S.C. § 5103(a).

STATEMENT OF THE CASE

Respondent veteran Woodrow F. Sanders filed a claim for service-connected disability benefits for injuries sustained while on active duty in the United States Army. The relevant Regional Office ("RO") of Department of Veterans Affairs ("VA" or "Agency") denied his claim, but failed to provide adequate notice as to who was responsible for providing evidence necessary to substantiate the claim prior to denying it. In doing so, the VA violated the notice provision of the Veterans Claims Assistance Act of 2000 ("VCAA"), Pub. L. No. 106-475, 114 Stat. 2096, the notice provision being codified at 38 U.S.C. § 5103(a) (2006). Mr. Sanders appealed to the VA's Board of Veterans Appeals ("Board"), which agreed with the determination made by the RO, and denied Mr. Sanders' appeal.

The veteran filed an appeal with the U.S. Court of Appeals for Veterans Claims ("Veterans Court"), arguing, inter alia, that the VA failed to abide by the notice provision of the VCAA. The Veterans Court denied Mr. Sanders' appeal because he did not demonstrate how he was prejudiced by the VA's failure to notify him of who would be

responsible for providing evidence necessary to substantiate his claim for benefits.

Mr. Sanders appealed the Veterans Court decision to the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). Finding that all VCAA notice errors should be presumed to be prejudicial to our veterans, the Federal Circuit reversed the Veterans Court's denial of Mr. Sanders' claim and remanded his case for further adjudication. This Court granted Secretary Peake's request for review of the Federal Circuit's decision.

SUMMARY OF THE ARGUMENT

In passing legislation codified at 38 U.S.C. §§ 5103 and 5103A (2006), Congress articulated the VA's duty to assist veterans in obtaining duly deserved benefits. The statutes provide that upon receipt by the VA of a complete or substantially complete application for benefits, the Agency must notify the claimant of evidence needed to substantiate his claim. The notice must also identify the party responsible for supplying that evidence in view of the VA's duty to assist veterans. See 38 U.S.C. 5103(a) (2006). However, Congress did not explicitly state the criteria courts should consider in determining the procedural consequences of the VA's failure to abide by the duty to assist set forth in the VCAA, including notice failures under § 5103(a). Such considerations are within the realm of the judiciary, whose role it is to interpret laws as intended by Congress.

Upon rendering its decision denying Mr. Sanders' appeal, the Veterans Court applied its precedent developed to address the ramifications of the VA's failure to adequately provide notice pursuant to § 5103(a). That precedent apportions the burden of proving that a defective notice prejudiced the interest of the claimant, depending upon the notice error involved. One type of notice error warrants a presumption of prejudice rebuttable by the VA, while other notice errors require the veteran to prove prejudice to avoid denial of his claim. See Sanders v. Nicholson, 20 Vet App. 143, No. 03-1846, 2005 WL 2055933, at *7 (Vet. App. Aug. 25, 2005). The Veterans Court erroneously believed that this presumption properly accounted for "the rule of prejudicial error," as required by 38 U.S.C. § 7261 (b)(2) (Supp. V 2005). Id.

The Federal Circuit found this allocation of the burden of proof to be contrary to the intended purpose of the VCAA. It surmised that the Veterans Court, although well-intentioned, created a system that essentially excused the VA's failure to follow the law and penalized our veterans with a complex series of administrative hoops to navigate during the claims process. In its opinion, the Federal Circuit noted that judicial precedent regarding the treatment of prejudicial error under the Administrative Procedures Act ("APA"), codified at 5 U.S.C. § 706 (2007), is not dispositive in the unique setting of veterans law. Sanders v. Nicholson 487 F.3d 881, 891 (Fed. Cir. 2007).

In view of the importance of veterans affairs and the evolution of the statute, the Association believes that the Federal Circuit properly considered Congressional intent in fashioning a remedy for the VA's failure to follow the notice requirement of the VCAA. The legislative history makes clear that the Agency must bear the burden of its errors – not our veterans. In Section I, the Association discusses several Congressional statements articulating the purpose of the VCAA and the criticality of the notice component to its implementation. In Section II, the Association explains why the unique nature of the veterans claims process necessitates flexible interpretation of 38 U.S.C. § 7261 (b)(2). Section III discusses how the Federal Circuit's presumption of prejudice takes "due account" of the rule of prejudicial error in the unique context of VCAA notice violations. The Association respectfully asks this Court to consider the legislative history unique to veterans law when evaluating judicial precedent applying the rule of prejudicial error.

ARGUMENT

I. NOTICE REQUIRED BY THE VCAA IS A CRITICAL COMPONENT OF THE UNIQUELY PRO-CLAIMANT VETERANS BENEFITS REGIME.

Congress enacted the VCAA in an effort to, inter alia, reaffirm that the laws providing for

veterans' benefits and their administration by the VA are unique within our nation's extensive network of statutory schemes:

> [T]he Department of Veterans Affairs' system for deciding benefits claims is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits.

H.R. Rep. No. 106-781 at 5 (internal quotation marks omitted).[2] These values were at the heart of the Federal Circuit's ruling in Sanders. 487 F.3d at 889 ("The Veterans Court, however, erred by not giving sufficient weight to the importance of claimant participation to the VA's uniquely pro-claimant benefits system."). Indeed, long before Sanders, the Federal Circuit had recognized the "uniquely pro-claimant" nature of the veterans benefits system. See Hensley v. West, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

Although the Government seizes upon the words "reaffirmation" and "clarification" in the VCAA to dismiss the significance of this statute in shaping veterans law, Pet.'s Br. at 20, the Government fails to appreciate the profound importance of the values that Congress sought to

---

[2] All emphasis in this brief is added unless otherwise indicated.

reaffirm in passing this Act in 2000. The VCAA's legislative history makes clear that the paternalistic, pro-claimant nature of the veterans benefits system needed "reaffirmation" because intervening case law had created barriers to the fulfillment of the VA's duty to assist veterans in the development of their claims.

Specifically, Congress crafted the VCAA in order to blunt the impact of Morton v. West, 12 Vet. App. 477 (1999), a decision that precluded the VA from assisting veterans until they submitted a "well-grounded" claim. Id. Congress felt that this "well-grounded" claim requirement was a significant hurdle that precluded many veterans from substantiating their claims for benefits: "As a result of court decisions construing the meaning of section 5107 of title 38, United States Code, concerning 'well-grounded' claims and the Secretary's 'duty to assist' a veteran in obtaining evidence in support of a claim, the VA is no longer able to provide assistance to veterans as it has in the past." H.R. REP. NO. 106-781 at 5 (2000); see also 146 CONG. REC. 22,886 (Oct. 17, 2000). Congress never intended our veterans laws to make access to VA benefits burdensome, and it was troubled by the mischief caused by Morton.

Indeed, when it promulgated rules implementing the VCAA, the VA understood what was already apparent to practitioners in the area of veterans benefits law (including members of the Association), i.e., that the VCAA fundamentally

changed the manner in which claims were processed. Those changes were manifested by, inter alia, requiring early notice to veterans so as to ensure proper development of their claims records. Specifically:

> The VCAA's legislative history indicates that Congress intended the new law to improve the efficiency of the adjudication process and the process by which subsequent claims for rating increases or service connection for additional conditions are handled, by ensuring proper development of the record when the claimant first submits an application for benefits. 146 Cong. Rec. S9211, S9212 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller). The drafters wanted claimants to know early in the claim process what was necessary to substantiate their claims. Therefore, the VCAA was drafted to impose on VA the duty to issue section 5103(a) notice early in the claim process.

Notice and Assistance Requirements, 71 FED. REG. 63,732, 63,733 (proposed Oct. 31, 2006).

The VA's comments on the importance of the VCAA's notice requirements are consistent with the statute's legislative history. The VCAA was deemed necessary in the wake of Morton because "[t]his and previous court decisions construing the meaning of

section 5107 of title 38, United States Code, have constructed a **significant barrier** to veterans who need assistance in obtaining information and evidence in order to receive benefits from the VA." 146 CONG. REC. 22,886 (Oct. 17, 2000). In providing the history leading up to the VCAA, Congressman Lane Evans commented that

> Last fall, after the Department of Veterans Affairs (VA) implemented the Morton v. West decision of the United States Court of Appeals for Veterans Claims, I introduced H.R. 3193, the Duty to Assist Act. This legislation was intended to correct erroneous interpretations of law. Judicial review was intended to continue VA's long standing obligation to assist all veterans with the development of their claims. Under the Morton decision, the exact opposite occurred.

146 CONG. REC. 22,889 (Oct. 17, 2000).

Congressman Evans went on to say that the compromise legislation being considered that day, H.R. 4864 (the VCAA), incorporated the critical provisions of the initial bill he crafted to address the detrimental effects of Morton on the veterans claims process. The House further explained that the notice provisions of the VCAA were a critical part of Congress's effort to reaffirm and revitalize the VA's duty to assist:

> The compromise agreement enhances the notice that the Secretary is now required to provide to a claimant and the claimant's representative regarding information that is necessary to complete the application. The notice would inform the claimant what information (e.g. Social Security number, address, etc.), and what medical evidence (e.g. medical diagnoses and opinions on causes or onset of the condition, etc.) and lay evidence (e.g. statements by the veteran, witnesses, family members, etc.) is necessary to substantiate the claim. The notice would also specify which portion of this information and evidence is to be provided by the Secretary or by the claimant.

146 CONG. REC. 22,887 (Oct. 17, 2000). Such legislation was necessary, according to Congressman Evans, because the notices provided to veterans by the VA often did not contain clear information enabling veterans to understand what actions the Agency had taken on their behalf, what actions the Agency would take in the future, and what information or evidence the veterans should supply to substantiate their claims. 146 CONG. REC. 22,889 (Oct. 17, 2000). Mr. Evans encouraged the VA to develop communications with veterans "using plain, understandable English" to make the notice process

transparent. 146 CONG. REC. 22,891 (Oct. 17, 2000). As explained by Congressman Evans:

> I strongly believe in judicial review. However, courts can - and do - make erroneous decisions. When those decisions affect the *fundamental rights of veterans*, it is Congress' responsibility to correct the problem. H.R. 4864, as amended, will do this.

146 CONG. REC. 22,890 (Oct. 17, 2000).

Thus, in crafting the VCAA, Congress attempted to correct the negative effects of judicial intervention in the claims process for veterans benefits by, inter alia, expressly codifying the notice requirement now at issue in this case. The legislative history demonstrates that the notice process, described as part of the "fundamental rights of veterans," should be clear and understandable, keeping in line with the objective of the VCAA to facilitate VA assistance of veterans in substantiating their benefits claims.

II. THE UNIQUE NATURE OF VETERANS BENEFITS NECESSITATES FLEXIBLE INTERPRETATION OF 38 U.S.C. § 7261(B)(2).

38 U.S.C. § 7261(b)(2) requires the Veterans Court to "take due account of the rule of prejudicial error." The statute does not allocate the burden of

proof on the issue of prejudice, nor does it suggest that the "rule of prejudicial error" will be applied in the same manner in all appeals. To the contrary, Congress's use of the phrase "due account" demonstrates that Congress understood that the rule would be applied differently in different situations. This understanding is reinforced by judicial interpretation of similar language in the Administrative Procedure Act, which provides that "due account shall be taken of the rule of prejudicial error." See 5 U.S.C. § 706. As Respondent Simmons has demonstrated, the "due account" taken of the rule of prejudicial error in APA appeals is flexible and context-specific, and Courts have required agencies to establish harmlessness in certain instances. Simmons Br. in Opp. at 8-11. Thus, the Federal Circuit correctly concluded that the text of § 7261(b)(2) left the Veterans Court with "considerable latitude as to how to take due account of the rule of prejudicial error." Sanders, 487 F.3d at 891 (quoting Mayfield v. Nicholson, 19 Vet. App. 103, 114 (2005)). The "account" that is "due" to the rule of prejudicial error under veterans law must necessarily consider the uniquely pro-claimant nature of the veterans benefits system and Congress's express desire to remove obstacles to the processing of claims.

Historically, our courts and agencies have relied on "the purpose and context of the statutory provision to glean the intent of Congress" in understanding a given statutory scheme. 3 Charles H. Koch, ADMINISTRATIVE LAW AND PRACTICE § 12.34[4] at 276 (2d ed. 1997). As Koch notes, "[t]he

court is to assure that the agency carries forward each intended purpose to the extent possible." Id. The D.C. Circuit Court of Appeals has recognized this principle, acknowledging that "if the agency 'does not reasonably accommodate the policies of a statute or reaches a decision that is 'not one that Congress would have sanctioned,' ... a reviewing court must intervene to enforce the policy decisions made by Congress.'" Environmental Defense Fund v. EPA, 852 F.2d 1316, 1326 (D.C. Cir. 1988) (internal citations omitted). Therefore, in reviewing appeals pertaining to benefits claims, our courts should interpret veterans laws such that they are applied as intended by Congress, i.e., to avoid constructing "significant barriers" to substantiating benefits claims and "to continue VA's long standing obligation to assist all veterans with the development of their claims." 146 CONG. REC. 22,886, 22,889 (Oct. 17, 2000).

A. The Veterans Court Misapplied 38 U.S.C. § 7261(B)(2) In View of the APA, Frustrating the Purpose of the VCAA.

The decision affirming the Board's handling of Mr. Sanders' claim is another example in which the Veterans Court, in the words of Congressman Evans, rendered an "erroneous decision" negatively affecting the "fundamental right[]" of our veterans to have VA assistance in substantiating their claims for benefits. Just as it did in Morton, the Veterans Court erred in Sanders when it interpreted the VCAA notice

provision to erect yet another barrier for claimants to overcome when seeking benefits.

The VA implemented the statutory notice requirement of 38 U.S.C. § 5103(a) by Agency regulation. See 38 C.F.R. § 3.159(b)(1) (2008). This regulation divides the notice requirement of the VCAA into four separate elements: 1) notice of what information or evidence not already of record is necessary to substantiate the claim; 2) notice of what subset of the necessary information or evidence, if any, that the claimant is to provide; 3) notice of what subset of the necessary information or evidence, if any, that the VA will attempt to obtain; and 4) a general notification that the claimant may submit any other evidence he or she has in his or her possession that may be relevant to the claim. See, e.g., Sanders, No. 03-1846, 2005 WL 2055933, at *7.

The Federal Circuit has acknowledged that VCAA notice errors are reviewed by the Veterans Court in accordance with 38 U.S.C. § 7261(b)(2), which directs the Veterans Court to "take due account of the rule of prejudicial error." Conway v. Principi, 353 F.3d 1369, 1374 (Fed. Cir. 2004). Although its opinion was well-intended, problems arose when the Veterans Court attempted to take "due account" of prejudicial error by assessing the worthiness of VCAA notice errors in view of APA precedent in Mayfield v. Nicholson, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006). The Mayfield decision held that first-element notice errors were deemed to be the most

grave, and any prejudice to the veteran arising from these errors is presumed. However, ostensibly because of APA precedent, the Veterans Court determined that notice errors 2-4 were not worthy of the presumption, meaning that veterans must demonstrate prejudice from the Agency's defective notice practice in order to further adjudicate their claims for benefits.

This is the logic that begat the inappropriate outcome of Mr. Sanders' appeal from the Board to the Veterans Court. Because Mr. Sanders did not allege a first-element notice error, and because he did not delineate how he was specifically prejudiced by the VA's notice error, the Veterans Court affirmed the Board's decision to deny Mr. Sanders' claim for benefits. Thus, Mr. Sanders was blocked from further consideration of his claim due to a procedural violation of the VCAA by the Agency. This result not only frustrates the very purpose of the VCAA - i.e., Agency assistance of veterans - but actually rewards the DVA for not following the law. The Agency should not be permitted to summarily eliminate claims by ignoring statutes and regulations. Yet the APA need not be construed such that its precedent eviscerates the VCAA in this stark manner.

B. General APA Precedent Should Not Bind Veterans Law Determinations.

The APA "sets forth standards governing judicial review of findings of fact made by federal administrative agencies." Dickinson v. Zurko, 527 U.S. 150, 152 (1999). There is no doubt that the prejudicial error rule set forth by the APA, as codified in 5 U.S.C. § 706, has been interpreted to require that the party challenging an agency's procedural error must demonstrate harm in order to proceed with his case. Palmer v. Hoffman, 318 U.S. 109, 116 (1943). However, cases interpreting § 706 do not control the interpretation of 38 U.S.C. § 7261 in view of the VCAA because the relationship between the VA and our veterans - a relationship contemplated by Congress when enacting the VCAA - is unique. There exists a special quid pro quo between our government and those who have sacrificed for it through military service. Congress has repeatedly affirmed the unique nature of veterans law:

> The "duty to assist," along with other principles such as giving the veteran the benefit of the doubt in benefits determinations, are parts of what make the relationship between the Department of Veterans Affairs (VA) and the claimant unique in the Federal Government. Congress has long recognized that this

> Nation owes a special obligation to its veterans. The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate.

CONG. REC. 19,229 (Sept. 25, 2000).

By contrast, there is no duty to assist, for example, patent applicants seeking Letters Patent from the United States Patent and Trademark Office ("USPTO"). No Congressional mandate exists directing patent examiners to obtain evidence and information helpful to substantiate a patent applicant's claims. Rather, patent prosecution often assumes an adversarial stance. See Hewlett-Packard Co. v. Bausch & Lomb, Inc., 116 F.R.D. 533, 543 (N.D. Cal. 1987) abrogated on other grounds, Advanced Cardiovascular Sys., Inc. v. C.R. Bard, Inc., 144 F.R.D. 372 (N.D. Cal. 1992) (reply to examiner's claim rejections intended to change examiner's mind, placing applicant in a "defensive position and in essence, in an adversary relation to the examiner"); see also J. Michael Strickland, Comments on Proposed Changes to Information Disclosure Requirements and Other Related Matters 4 (September 8, 2006), available at http://www.uspto.gov/web/offices/pac/dapp/opla/comments/ab95/gsk.pdf ("As long as the specter of inequitable conduct hangs over the prosecuting attorney, the prosecution of patent applications will, as a necessity, remain an adversarial process."). This example illustrates why the paternalistic

relationship specific to the VA and its clients sets the veterans claims process apart from other federal agency practice.

While the APA's objective is to provide a uniform platform for federal administrative agency procedures, the Act does not require rigid application of its principles. The language of 5 U.S.C. § 559 (2007) provides for exceptions to the APA's constraints on judicial review of administrative actions, although subsequent legislation modifying APA provisions must clearly indicate the basis for such exceptions. As recognized by this Court, § 559 states that the APA does not "limit or repeal additional requirements recognized by law." See Zurko, 527 U.S. at 154-55. In Zurko, this Court held that, even though exceptions to the APA's scope of review are permissible, the Federal Circuit's heightened review of USPTO actions was not a recognizable exception to the APA's standard of review pursuant to 5 U.S.C. § 559.

However, unlike the situation in Zurko, the scope of judicial review of VA determinations is not subject to the APA, because Congress carved out a specific statute covering this aspect of claims proceedings, namely 38 U.S.C. § 7261. Nonetheless, if subject to the APA, the VCAA - which was plainly intended to enhance the VA's duty to assist veterans in substantiating their claims - would fall within the "additional requirements recognized by law" exception set forth in § 559. This explicit recognition of the importance of "additional requirements"

validates a different interpretation of "the rule of prejudicial error" in the unique context of veterans law.

C. The Rule of Prejudicial Error Should Be Applied Flexibly to Veterans Law.

As Congress has recognized, the paternalistic relationship between the VA and our veterans is like no other, and veterans laws should be interpreted to avoid distorting that relationship. Supra Section I. Accordingly, the Association believes that a flexible approach is in order for applying the "rule of prejudicial error" during judicial review of veterans claims. It is not necessary to rigidly interpret "the rule of prejudicial error" in view of APA precedent as APA precedent outside the veterans context lacks the special focus demanded by Congress when interpreting veterans statutes. Thus, to the extent that it results in an outcome inconsistent with the purpose of the VCAA, prior interpretation of the APA in non-veterans cases should not be dispositive of the proper application of the "rule of prejudicial error" in the veterans law context.

The VA is statutorily obligated to aid our veterans in obtaining benefits to care for those who have borne the battle.[3] Our courts must be mindful

---

[3] The motto of the VA, which is reproduced on a plaque at an entrance to its headquarters in Washington, D.C., recites: "to care for him who shall have borne the battle and for his widow and his orphan." Abraham Lincoln, Second Inaugural

of this special relationship when interpreting veterans law to avoid creating precedent that de facto makes the VA adversarial to veterans, or makes the benefits process difficult for our veterans to navigate. When discussing the VCAA legislation under consideration in 2000, Congressman Quinn noted that he wanted

> to make certain our colleagues understand that this is an effort by the Veterans Subcommittee on Benefits to make the VA more user friendly, more constituent friendly. When we have said so many times on the subcommittee, when there is an area that is not certain, the benefit of the doubt should always go to the veteran when we are able to do that.

CONG. REC. 16,053 (July 25, 2000). That benefit of the doubt should be a polestar guiding interpretation of the laws that govern the VA's claims process. This Court has previously followed this guidance when interpreting veterans statutes. See Brown v. Gardner, 513 U.S. 115 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor.").

In sum, the legislative history of the VCAA crystallizes the error perpetuated by the Veterans

---

Address, in 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler, ed., 1953).

Court in its Sanders decision; by adhering to non-veterans APA precedent, the court made the claims process more onerous for our veterans, not more user friendly. In doing so, the Veterans Court failed to "enforce the policy decisions made by Congress." Environmental Defense Fund, 852 F. 2d at 1326. The Federal Circuit correctly addressed this error.

III. THE FEDERAL CIRCUIT'S PRESUMPTION OF PREJUDICE TAKES "DUE ACCOUNT" OF THE RULE OF PREJUDICIAL ERROR IN THE UNIQUE CONTEXT OF VCAA NOTICE ERRORS.

A. Requiring Veterans to Prove Prejudice Would Undermine the Nonadversarial Nature of the Veterans Benefits System.

The Federal Circuit correctly recognized that placing the burden on veterans to demonstrate prejudice would contravene "Congress's clear desire to create a framework conducive to efficient claim adjudication" and would "create[] a system that practically requires a claimant asserting a notice error to seek counsel simply to be able to navigate the appeal process." Sanders, 487 F.3d at 889. The Federal Circuit's reasoning is entirely valid. The Veterans Court decision in Sanders would require veterans to demonstrate prejudice arising from VA notice violations in order to pursue their benefits

claims. Assistance of counsel will surely be necessary to prove such prejudice.

A statutory interpretation under which veterans will require counsel to navigate the system is plainly wrong. As the Government recognizes, this Court has held that "the VA's administrative claims-adjudication process is nonadversarial and is 'designed to function throughout with a high degree of informality and solicitude for the claimant.'" Pet.'s Br. at 24 (quoting Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 311 (1985)).

Congress not only designed the veterans benefits system to operate without the need for attorneys, the system until recently actually discouraged the retention of attorneys whose fees might consume part of a veteran's benefits:

> The Government interest, which has been articulated in congressional debates since the fee limitation was first enacted in 1862 during the Civil War, has been this: that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer.

Walters, 473 U.S. at 321. Attorney representation before the VA, while permissible, should not be made a de facto requirement by a judicial misreading of statutory language.

The Government argues that there is no need for attorney representation before the VA because of the non-adversarial nature of the veterans claims process. In arguing that proceedings before the Veterans Court - unlike those before the VA - are intended to be adversarial, thereby distinguishing the need for representation in court as opposed to during Agency proceedings, the Government misses the point. Pet's. Br. at 24-25 Any violation of the VCAA's notice requirements necessarily occurs at the *outset* of the administrative process, which the Government concedes should be non-adversarial. Id. at 24. Requiring veterans to demonstrate prejudicial error from such a violation would necessitate retention of counsel by claimants during proceedings before the RO and the Board in order to (1) identify the occurrence of the error, and (2) create a record that will allow them to demonstrate prejudice on appeal. Such a requirement would not only frustrate Congress's recognized interest in a nonadversarial adjudication process, it could dilute the benefits available to a needy veteran by diverting some of them to attorneys. See Walters, 473 U.S. at 321.

Moreover, retaining counsel on appeal to the Veterans Court will not permit the veteran to carry the burden the Government would place on him - at that point, the record on appeal is closed. 38 U.S.C.

§ 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); accord id. § 7261(b); Bonhomme v. Nicholson, 21 Vet. App. 40 (2007) ("The authority of the Court, which - as noted above - is not part of the Agency, is limited to reviewing the correctness of the Agency's factual and legal conclusions based on the record before the Agency *at the time of its decision.*" (emphasis in original)).[4] Instead, retention of counsel would be needed at the Agency level to identify the error and craft a record sufficient to demonstrate prejudice. This creates precisely the anomaly predicted by the Federal Circuit. Sanders, 487 F.3d at 889.

In Sanders, the Federal Circuit properly recognized that the legal and factual issues relevant to a showing of prejudice are generally obscure rules of appellate procedure that would not be intelligible to a veteran unassisted by counsel. Sanders at 889-90 (noting that "the system articulated by the Veterans Court requires a claimant, simply in order to rectify the VA's failure to comply with its statutorily mandated responsibilities, to . . . figur[e] out what it means to 'affect the essential fairness of the adjudication'"). Veterans benefits claims often deal with complicated medical and technical issues.

---

[4] Although the Veterans Court is permitted to "go outside of the facts as found by the Board to determine whether an error was prejudicial," the Court's review is still limited to "'the record of the proceedings before the Secretary and the Board.'" Mlechick v. Mansfield, 503 F.3d 1340, 1345 (Fed. Cir. 2007) (quoting 38 U.S.C. § 7261(b)(2)).

In light of the VCAA, there is no justifiable rationale for introducing yet another layer of complexity into the process by imposing a burden to demonstrate prejudicial error. See Pet's. Br. at 25. If required to prove prejudice, many veterans may find it physically or financially impossible to secure the services of an attorney to overcome the burden, and may, consequently, forfeit their claims.

B. The Federal Circuit Properly Required the Government to Prove Harmlessness Because VCAA Notice Errors Have the Natural Effect of Prejudicing Veterans' Substantial Rights.

The Federal Circuit properly recognized that, "'[i]f the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, [then] the burden of sustaining a verdict will . . . rest upon the one who claims under it.'" Sanders, 487 F.3d at 889 (quoting Kotteakos v. United States, 328 U.S. 750, 760 (1946)). The Government argues that the Federal Circuit misapplied this rule in three respects: First, it argues that Kotteakos does not apply because veterans benefits claims do not involve "an individual's loss of liberty," but rather "administrative adjudication of an entitlement to monetary benefits," which the Government equates with "'mere civil liability.'" Pet.'s Br. at 27-28 (quoting O'Neal v. McAninch, 513 U.S. 432, 440 (1995)). Second, the Government argues that the rule in Kotteakos does not apply to judicial review of

agency action. Pet.'s Br. at 28-29. Finally, the Government argues that VCAA notice errors do not have the natural effect of prejudicing veterans' substantial rights. Id. at 30-35. The Government's argument is incorrect on all three points.

First, the Federal Circuit correctly observed that "[t]he fact that Kotteakos involved a criminal matter is immaterial, as 'precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights.'" Sanders, 487 F.3d at 889 (quoting O'Neal, 513 U.S. at 441). The Government attempts to avoid this result by equating veterans benefits claims with cases involving "mere civil liability," in which, as stated in O'Neal and Kotteakos, the appellant bears the burden of demonstrating prejudice. Pet.'s Br. at 27-28; O'Neal, 513 U.S. at 440; Kotteakos, 328 U.S. at 763 (stating that the statute in that case "did not require the same judgment in such a case as one involving only some question of civil liability").

A veteran's entitlement to disability compensation, however, is fundamentally more important than simply "some question of civil liability." Kotteakos, 328 U.S. at 763. The covenant between this Nation and its veterans is reflected in the VA's own motto: "to care for him who shall have borne the battle and for his widow and his orphan." Http://www1.va.gov/opa/feature/celebrate/vamotto.asp; see also n.3. It is further reflected in the "uniquely pro-claimant" regime that Congress

has created to administer veterans benefits, one which "imposes on the Board an obligation to 'fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits.'" McGee v. Peake, 511 F.3d 1352, 1357 (Fed. Cir. 2008) (quoting H.R. REP. NO. 100-963 at 13, reprinted in 1988 U.S.C.C.A.N. 5782, 5795). As one Judge on the Federal Circuit has observed:

> The benefits administered by the Secretary are an entitlement by which the Nation keeps its commitment to our veterans who have sacrificed to protect and defend our freedom. Thus, Congress . . . recognizes the value of demonstrating to veterans—to all those currently serving in our military and to those who may serve in the future—that America honors its commitments to those who have served.

Cook v. Principi, 318 F.3d 1334, 1358 (Fed. Cir. 2003) (Gajarsa, J., dissenting).

Thus, the fact that a veteran's livelihood—as opposed to his liberty—is at stake, provides no suitable basis for dismissing veterans' disability claims. See 38 C.F.R. § 4.1 (stating that VA disability ratings "represent as far as can practicably be determined the average impairment in earning capacity" resulting from the veteran's service-connected disability). The Federal Circuit properly looked to these cases for guidance in allocating the

burden of proof regarding prejudice in appeals before the Veterans Court.

Second, the Government suggests that the rule in Kotteakos should not apply to judicial review of agency action, as opposed to trial court judgments. Pet.'s Br. at 28-29. The Association agrees that it is important to observe "vital differentiations between the functions of judicial and administrative tribunals," FCC v. Pottsville Broad. Co., 309 U.S. 134, 144 (1940), but in this case, those differences support the Federal Circuit's ruling. Unlike a trial record, a veterans claims record is controlled exclusively by the VA. Indeed, in the "uniquely pro-claimant" statutory scheme for veterans benefits, McGee, 511 F.3d at 1357, the VA's duty to assist requires the VA to develop the record on the veterans' behalf before making a decision on the veteran's claim. Id.; 38 U.S.C. § 5103A (obligating the VA to obtain records and other information for the veteran).

Unlike a trial setting, where a party will rely on his or her own counsel to ensure that the factual record is complete, veterans usually rely on the VA's duty to assist them in adequately developing their claims records. Kelly v. Nicholson, 463 F.3d 1349, 1353 (Fed. Cir. 2006) (observing that "veterans generally are not represented by counsel before the RO and the board"). The Federal Circuit understood this, and correctly recognized that the notice required by the VCAA is intended to "afford[] a claimant a meaningful opportunity to participate

effectively in the processing of his or her claim" by allowing the veteran to introduce additional evidence into the record. Sanders, 487 F.3d at 889; see also id. at 886. Thus, far from overlooking "vital differentiations between the functions of judicial and administrative tribunals," Pottsville Broad., 309 U.S. at 144, these differences go to the heart of the Federal Circuit's ruling.

The Government's reliance on "ordinary civil cases" in which the appellant failed to provide an adequate record on which prejudice could be determined is therefore misplaced. Pet.'s Br. at 29-30 (citing, inter alia, Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1239 (10th Cir. 1999)). The record on appeal before the Veterans Court is the record created by the VA - ostensibly for the veteran's benefit. 38 U.S.C. § 7252(b) ("Review in the Court shall be on the record of proceedings before the Secretary and the Board."); accord id. § 7261(b). In VCAA notice error cases, that record is one to which the veteran has not been given a meaningful opportunity to contribute. Sanders, 487 F.3d at 891. The Federal Circuit correctly concluded that requiring the veteran to prove prejudice in such a case would "frustrate[] the very purpose of the notice." Id.

These points also dispose of the Government's third argument, which is that VCAA notice errors do not have the "natural effect" of prejudicing a veteran's "substantial rights" as contemplated by Kotteakos. 328 U.S. at 760; Pet.'s Br. at 30-35. As

discussed in Section I, supra, Congress required this notice to overcome judicially created obstacles, as a result of which "the VA [was] no longer able to provide assistance to veterans as it ha[d] in the past." H.R. REP. NO. 106-781 at 5 (2000); see also 146 CONG. REC. 22,886 (Oct. 17, 2000). Indeed, when it promulgated rules implementing the VCAA's notice requirements, the VA itself recognized that this notice was necessary to "ensur[e] proper development of the record when the claimant first submits an application for benefits." Notice and Assistance Requirements, 71 FED. REG. 63,732, 63,733 (proposed Oct. 31, 2006). VA notice errors preclude this insurance, eroding the fundamental fairness of the claims proceeding.

Our government has a long standing interest in the welfare of veterans, providing them treatment different from that provided to non-veterans under similar circumstances. The legislative history of the VCAA demonstrates 1) that Congress classifies veterans as a special group of governmental beneficiaries, and 2) that the notice process, described as part of the "fundamental rights of veterans," 146 CONG. REC. 22,890, was intended to facilitate VA assistance of this special group in substantiating their claims for benefits. Indeed, this Court has recognized that "'a person in jeopardy of serious loss (must be given) notice of the case against him and opportunity to meet it.'" Mathews v. Eldridge, 424 U.S. 319, 348 (1976) (internal citation omitted). Here, as in Mathews, the basic principle of notice is "the opportunity to be heard 'at a

meaningful time and in a meaningful manner.'" Id. at 333 (internal citation omitted). Accordingly, the "fundamental rights" of veterans, including proper notice pertaining to benefits claims, must be protected.

Thus, by presuming that VCAA notice errors result in prejudice unless shown to be harmless, the Federal Circuit simply accepted Congress's legislative determination that this notice was necessary to ensure proper and fair development of the record. 71 FED. REG. at 63,733. The Federal Circuit therefore correctly concluded that, "the natural effect of such an error would 'constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the appellant] from participating effectively in the processing of her claim,' defeating the very purpose of § 5103(a) notice." Sanders, 487 F.3d at 890 (quoting Mayfield, 19 Vet. App. at 122).[5] Tellingly, nothing in the Government's brief answers the Court's common-sense question: "If Congress felt that such notice elements were not necessary to allow the claimant to effectively participate in the

---

[5] Sanders made this statement in the context of first-element notice errors, but correctly recognized that the same reasoning applied to second-, third-, and fourth-element notice errors as well. 487 F.3d at 890 ("Congress clearly viewed the claimant's participation as essential to processing his or her claim for VA benefits, and believed that the claimant should be notified which evidence he or she was responsible for providing and which evidence the government was responsible for providing.").

proceeding of his or her claim, then why would it have required them as part of the notice pursuant to § 5103(a)?" Id. at 891.

C. The Rebuttable Presumption Established by the Federal Circuit Takes Due Account of the Rule of Prejudicial Error.

The Federal Circuit in Sanders crafted an efficient and reasonable solution to the problem created by the VA's failure to give veterans the notice mandated by Congress. Under Sanders, the "rule of prejudicial error" continues to apply in all cases - the Veterans Court will not reverse a decision of the Board unless the error is one that is "significant to the outcome of the matter." Sanders, 487 F.3d at 891 (quoting S. REP. NO. 100-481 at 62 (1988)). Sanders simply accepted Congress's judgment regarding the significance of early and adequate notice to veterans and created a rebuttable presumption that such errors are prejudicial.

In fact, the VA has successfully rebutted this presumption on several occasions in the year since Sanders was decided. See, e.g., Salvania v. Peake, No. 05-2116, 2008 WL 1959467 at **3-4 (Vet. App. May 6, 2008); Fitz v. Peake, No. 05-3464, 2008 WL 2128227 at **3-4 (Vet. App. Feb. 21, 2008); Strock v. Peake, No. 05-3560, 2008 WL 566394 at **2-3 (Vet.App. Feb. 7, 2008). These cases refute any suggestion that Sanders eliminated the rule of prejudicial error from veterans decisions.

The Government correctly observes that "the informal and non-adversarial process for adjudicating claims for veterans benefits provides many procedural safeguards that have the potential to cure any defect in the initial Section 5103(a) notice." Pet.'s Br. at 31-35. This observation, however, does not support the Government's argument, and is in fact entirely consistent with the Federal Circuit's holding in Sanders. That the VA might subsequently cure a VCAA notice error by some other means does not undermine Congress's determination that proper notice is necessary to "ensur[e] proper development of the record when the claimant first submits an application for benefits." Notice and Assistance Requirements, 71 FED. REG. at 63,733. If anything, these curative safeguards justify placing the burden on the VA to prove that information required under the VCAA was provided to the veteran in some manner other than § 5103(a) notice. See Sanders, 487 F.3d at 889 (allowing the VA to rebut the presumption of prejudice "by demonstrating . . . that any defect was cured by actual knowledge on the part of the claimant").

Moreover, remands should have only a negligible impact on the VA unless the veteran submits new evidence to support his or her claim. As the Government explains, remand requires the VA "to send the case back to the regional office, provide an additional [VCAA-compliant] notice to the appellant, await a response from the appellant, and then readjudicate the remanded claim." Pet.'s Br. at 36. If, as the Government presumes, "[m]any

of those remands would be pointless because . . . the notice error would have made no difference to the outcome of the proceeding," the VA will simply reaffirm its previous decisions when no additional evidence is submitted. Id. At times, the VA may have to expend additional resources when a veteran does, in fact, submit requisite evidence identified in the notice. However, this is precisely the sort of veteran participation in the claims process that Congress sought to ensure when it initiated the notice requirement. Supra Section I.

CONCLUSION

Congress passed the notice provision of the VCAA to ensure that veterans understand what evidence and information is to be provided by the VA - as well as themselves - in order to perfect a claim for benefits. When the VA fails to provide notice in compliance with 38 U.S.C. § 5103(a), it, and not the veteran, should be obligated to bear the burden of its error. Requiring veterans to shoulder the additional responsibility of proving prejudice rewards the Agency for failing to follow the law. This simply cannot be a correct interpretation of 38 U.S.C. § 7261 (b)(2) in view of the VCAA, and is surely contrary to the very purpose for which the VCAA was enacted. Because Congress views veterans laws through a unique prism, judicial precedent interpreting the APA in non-veterans cases should not be considered dispositive by the Veterans Court when reviewing VCAA notice errors under the prejudicial error rule

of § 7261(b)(2). A flexible approach is necessary to honor Congress's intent in passing the VCAA.

Respectfully submitted,

Daniel P. Graham
Member
Veterans Appeals
Committee of the Federal
Circuit Bar Association
WILEY REIN, LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7433

Blair Elizabeth Taylor*
Chair
Veterans Appeals
Committee of the Federal
Circuit Bar Association
COVINGTON & BURLING, LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 662-5669

Attorneys for Amicus Curiae Federal Circuit Bar Association

* *Counsel of Record*

October 21, 2008

AMICUS CURIAE BRIEF

OCT 21 2008

No. 07-1209

IN THE

Supreme Court of the United States

JAMES B. PEAKE,
Secretary of Veterans Affairs,
Petitioner,

v.

WOODROW F. SANDERS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AMERICAN MILITARY RETIREES ASSOCIATION, NATIONAL VETERANS ORGANIZATION OF AMERICA, NATIONAL DEFENSE COMMITTEE, REAR ADMIRAL (RET.) JAMES J. CAREY, AND VETERANS UNITED FOR TRUTH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: October 21, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

When the Department of Veterans Affairs denies a claim after failing to provide the notice to a claimant required by 38 U.S.C. § 5103(a) – including notice of any information and any medical or lay evidence not previously provided to the VA that is necessary to substantiate a claim, and notice regarding which portion of the information is to be supplied by the claimant and which portion is to be supplied by the VA – and the VA seeks to avoid a ruling overturning its decision by asserting that its error did not prejudice the claimant, should the VA bear the burden of demonstrating the absence of prejudice?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. THE VCAA IMPOSES THE BURDEN OF PROOF ON THE VA 11

A. The Overall Structure of the Statutory Scheme Governing VA Claims Indicates That the VA Bears the Burden of Establishing That Its Errors Did Not Prejudice the Claimants 11

B. The Circumstances Surrounding Adoption of the VCAA Confirm That Congress Intended to Impose the Burden of Proof on the VA 15

Page

II. SECTION 7261(b)(2) DOES NOT SUPPORT THE VA BECAUSE THERE IS NO UNIFORM UNDERSTANDING REGARDING ALLOCATION OF THE BURDEN OF PROOF UNDER THE RULE OF PREJUDICIAL ERROR 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases:

American Coke and Coal Chems. Inst. v. EPA,
452 F.3d 930 (D.C. Cir. 2006) 20-21
Braniff Airways, Inc. v. Civil Aeronautics Bd.,
379 F.2d 453 (D.C. Cir. 1967) 19
Buschman v. Schweiker,
676 F.2d 352 (9th Cir. 1982) 20
Chamber of Commerce of U.S. v. SEC,
443 F.3d 8980 (D.C. Cir. 2006) 22
Davis v. Michigan Dep't of Treasury,
489 U.S. 803 (1989) 12
Evans v. Sec'y of Defense,
944 F. Supp. 25 (D.D.C. 1996) 20
FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 12
Friends of Iwo Jima v. Nat'l Capital Planning Comm'n, 176 F.3d 768 (4th Cir. 1999) 20
Kotteakos v. United States,
328 U.S. 750 (1946) 21
Mayfield v. Nicholson,
19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006) .. 6, 19, 20
Mayfield v. Nicholson,
499 F.3d 1317 (Fed. Cir. 2007) 16
McLouth Steel Prod. Corp. v. EPA,
838 F.2d 317 (D.C. Cir. 1988) 20, 22
Morton v. West,
12 Vet. App. 477 (1999) 8, 16, 17, 18
O'Neal v. McAninch,
513 U.S. 432 (1995) 21
Sierra Club v. U.S. Fish & Wildlife Serv.,
245 F.3d 434 (5th Cir. 2001) 19

Page(s)

Sprint Corp. v. FCC,
315 F.3d 369 (D.C. Cir. 2003) 21, 22
Sugar Cane Growers Co-op of Fla. v. Veneman,
289 F.3d 89 (D.C. Cir. 2002) 22
U.S. Steel Corp. v. EPA,
595 F.2d 207 (5th Cir. 1979) 19
Walters v. National Ass'n of Radiation Survivors,
473 U.S. 305 (1985) 13

Statutes:

Administrative Procedure Act 9

Veterans Claims Assistance Act of 2000 (VCAA),
Pub. L. No. 106-475, 114 Stat. 2096 ..... *passim*

5 U.S.C. § 706 ..... 9, 10, 18, 19

38 U.S.C. § 5103(a) ..... *passim*

38 U.S.C. § 5103A 4

38 U.S.C. § 7252(a) 13

38 U.S.C. § 7252(b) 13

38 U.S.C. § 7261(a)(4) 13

38 U.S.C. § 7261(b)(1) 13

38 U.S.C. § 7261(b)(2) ..... *passim*

Page(s)

38 U.S.C. § 5107(b) (1991) 16

Miscellaneous:

S. Rep. No. 418, 100th Cong., 2d Sess. (1988) 13

U.S. Vet. App. R. 28(a) 7

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AMERICAN MILITARY RETIREES ASSOCIATION, NATIONAL VETERANS ORGANIZATION OF AMERICA, NATIONAL DEFENSE COMMITTEE, REAR ADMIRAL (RET.) JAMES J. CAREY, AND VETERANS UNITED FOR TRUTH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a nonprofit, public-interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise principles, individual rights, a limited and accountable government, and the proper use of our state and federal administrative systems. To that end, WLF has frequently appeared in this and other federal and state courts to ensure that administrative agencies adhere to the rule of law. *See, e.g., Exxon Mobil Corp. v. Federal Energy Regulatory Comm'n*, No. 08-212 (U.S., petition for cert. filed August 18, 2008).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* hereby affirm that no counsel for a party authored any part of this brief, and that no person or entity other than *amici curiae* and their counsel provided financial support for the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

as *amicus curiae* in this Court on a number of occasions.

The American Military Retirees Association (AMRA) is a nonprofit organization that advocates on behalf of retired military personnel. The AMRA encourages military retirees to band together to protect earned benefits by educating on benefits available and advocating for protection of earned benefits through active monitoring of legislation in the U.S. Congress and the policies and proposals of the Department of Defense and the Department of Veterans Affairs (VA).

The National Veterans Organization of America, Inc. (NVOA) is a nonprofit organization dedicated to the preservation and enhancement of Veterans Benefits. It has more than 5,000 members nationwide, consisting primarily of disabled veterans. A primary focus of NVOA is reducing delays by the VA in processing claims submitted by veterans.

The National Defense Committee is a grass roots, pro-military organization supporting a larger and stronger military and increased participation by veterans in public service. Its Chairman is Rear Admiral (Ret.) James J. Carey. Carey served 33 years in the U.S. Navy and Navy Reserve and later served as Chairman of the Federal Maritime Commission.

Veterans United for Truth, Inc. is a nonprofit organization dedicated to serving the interests of both current military personnel and veterans. Veterans United for Truth works to improve the accession, training, equipping, and commitment of active-duty and reserve force military; to ensure that all persons active, reserve, and guard are told the truth about the reasons

for their commitment to specific conflicts, and the truth about their obligations; to work to ensure that the dependents of all persons on active duty receive services in a timely fashion; and to work for legislation that guarantees benefits to all veterans without undue administrative complexity.

Amici are concerned that the position espoused by the VA in this case, if adopted by the Court, will render meaningless provisions of federal law designed to guarantee that the VA will notify all applicants for veterans benefits regarding what information they need to provide in order to substantiate their claims. Most veterans apply for disability benefits without the assistance of counsel. Congress has recognized that without the assistance of the VA, many such applicants will not know how to marshal necessary evidence to support their claims. Thus, Congress has mandated that the VA provide such assistance. But *amici* fear that if the VA's interpretation of that mandate prevails, the VA will have a reduced incentive to provide the assistance that many veterans so desperately need.

The *amici* have no direct interest, financial or otherwise, in the outcome of this case. They are filing due solely to their interest in the important issues raised by this case.

STATEMENT OF THE CASE

Respondents are two veterans who assert that they are suffering from service-connected disabilities. Their applications for disability benefits have been pending before the VA for many years.

For purposes of this petition, the VA does not contest that it failed to comply with federal law in handling those claims. It failed to comply with a notice provision of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096, which provides as follows:

> **Notice to claimants of required information and evidence**
>
> (a) Required information and evidence. – Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with [38 U.S.C. § 5103A] and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

The VA ultimately denied Respondents' disability claims. The U.S. Court of Appeals for the Federal Circuit ruled that the VA's failure to comply with its duty under § 5103(a) to provide proper notification to Respondents requires that their claims be re-opened, in the absence of evidence from the VA that Respondents were not prejudiced by the VA's errors. Pet. App. 1a-21a, 56a-64a. The issue before the Court is who – as

between a claimant and the VA – bears the burden of proof regarding prejudice arising from an admitted violation of the § 5103(a) notification requirements.[2]

Respondent Patricia Simmons served on active duty in the U.S. Navy from 1978 to 1980. In 1980, she applied to the VA for disability benefits for hearing loss in her left ear. Although the VA determined that Simmons was suffering from a service-connected disability, it denied her claim on the grounds that the disability was not sufficiently severe to merit compensation. Simmons renewed her claim in 1998, asserting that her hearing loss had gotten worse. When the VA again denied her claim, she appealed to the U.S. Court of Appeals for Veterans Claims (the "Veterans Court").

The Veterans Court agreed with Simmons that the VA had failed to comply with the § 5103(a) notice requirements in her case because the VA had failed to inform her (1) that establishing her claim would require her to demonstrate an increase in severity in her service-connected condition; and (2) what types of evidence or information were needed, or could be submitted to establish that claim. *Id.* 78a-79a. The court held that Simmons was entitled to have her case re-opened because the VA had not met its burden of proving that its violation of § 5103(a) had not prejudiced Simmons. *Id.* 80. The Federal Circuit affirmed, holding that the VA bears the burden of demonstrating that a VCAA § 5103(a) violation did not prejudice the claimant. *Id.* 56a-64a.

---

[2] Petitioner James B. Peake, Secretary of Veterans Affairs, will be referred to herein as "the VA."

Petitioner Woodrow Sanders served in the U.S. Army from 1942 to 1945. In 1948, he applied to the VA for disability benefits, claiming that an eye condition from which he suffered was service-connected; he contended that he incurred the injury when a bazooka exploded near him in France in 1944, burning his face. The VA denied the claim in 1949. Sanders sought to re-open the claim 40 years later, but the VA again denied the claim in 2003. He appealed to the Veterans Court, claiming (among other things) that the VA had failed to provide the notice required by § 5103(a) because in writing to him regarding what additional information was needed, it had failed to indicate which portion of the additional information was to be provided by Sanders and which portion was to be provided by the VA.

The Veterans Court affirmed. Pet. App. 24a-38a. The court applied the framework it had previously established for determining whether a claimant has been prejudiced by the VA's violation of § 5103(a)'s notification requirements.[3] *Id.* 37a-38a. Accepting for purposes of the appeal that the VA had not complied

---

[3] In a prior case, the Veterans Court had determined: (1) a violation of § 5103(a) is grounds for overturning a decision denying benefits only if the claimant has been prejudiced by the violation; (2) if the violation consists of a failure to notify the claimant regarding additional information necessary to substantiate the claim (as in Simmons's case), the burden falls on the VA to demonstrate an absence of prejudice; and (3) if the violation is of another types (*e.g.*, a failure to provide notice of who would ultimately be responsible for obtaining necessary information, the type of violation alleged by Sanders), the burden falls on the claimant to demonstrate that he was prejudiced by the VA's violation. *See Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

with the § 5103(a) notification requirements, the court held that Sanders nonetheless was not entitled to relief because he had "not alleged any specific prejudice" caused by the VA's noncompliance. *Id.* 38a.

The Federal Circuit reversed. Pet App. 1a-21a. The court stated:

> [W]e hold that any error in a VCAA notice should be presumed prejudicial. The VA has the burden of rebutting this presumption. That said, this opinion does not displace the rule that the claimant bears the burden of demonstrating error in the VCAA notice, *see* U.S. Vet. App. R. 28(a), nor does it change the rule that reversal requires the essential fairness of the adjudication to have been affected. This opinion merely clarifies that all VCAA notice errors are presumed prejudicial and that the VA has the burden of rebutting this presumption.

Id. 19a. The court said that the VA can demonstrate that a claimant was not prejudiced by a VCAA § 5103(a) notice violation (*i.e.*, that "the purpose of the notice provision was not frustrated") by demonstrating, *e.g.*: "(1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice what was needed, or (3) that a benefit could not have been awarded as a matter of law." *Id.* 14a-15a. The Federal Circuit remanded the case to the Veterans Court "for proceedings consistent with this opinion." *Id.* 21a.

SUMMARY OF ARGUMENT

Neither § 5103(a) nor 38 U.S.C. § 7261(b)(2) (the provision on which the VA focuses much of its brief) directly addresses the issue raised by this case: which party bears the burden of proof on the issue of whether a claimant has been prejudiced by the VA's violation of the VCAA notice provision. *Amici* agree with Respondents that a fair reading of the entire statutory scheme governing VA claims leads to the conclusion that Congress intended to place on the VA the burden of demonstrating that its own errors in notifying a claimant did not prejudice the claimant.

Amici write separately to focus on the circumstances surrounding adoption of the VCAA in 2000. *Amici* submit that those circumstances make crystal clear that Congress intended to place the burden of proof on the VA. The VCAA was adopted in response to a Veterans Court decision, *Morton v. West*, 12 Vet. App. 477 (1999), which held in essence that the VA should not waste its resources by assisting veterans in developing their disability claims unless the claims were well-grounded. Congress responded by reversing the result in *Morton*; it adopted the VCAA to require the VA to assist *all* disability claimants in developing their claims, even those veterans whose initial submissions are deemed not well-grounded by VA personnel. Among the assistance measures mandated by the VCAA were the § 5103(a) notification requirements.

By asserting that veterans whose claims have been denied bear the burden of demonstrating that they were prejudiced by the department's violations of § 5103(a), the VA is essentially seeking to reinstate

Morton. After all, as the Federal Circuit explained in this case, a claimant is not prejudiced by a § 5103(a) violation if his claim is determined by a reviewing court to be not well-grounded in the law. Thus, as the VA would have it, a veteran has no basis for complaining to a reviewing court about the VA's failure to provide him with the assistance mandated by § 5103(a) unless *the veteran* can demonstrate that his claim was, indeed, well-grounded.[4] The VA even uses *Morton*'s precise rationale for excusing its failure to provide assistance: not providing such assistance allows it to conserve its resources for more deserving veterans. Pet. 25 (Remanding cases in which the VA has violated § 5103(a) "will divert resources from the adjudication of meritorious claims."). *Amici* respectfully submit that when Congress adopted the VCAA in 2000 to overrule *Morton*, it could not have intended to permit the VA to achieve the same result by reintroducing the discredited *Morton* rationale through the back door.

In support of its position that claimants ought to bear the burden of proof on the issue of prejudice, the VA points to 38 U.S.C. § 7261(b)(2), which provides that the Veterans Court, in reviewing appeals from VA claims determinations, should "take due account of the rule of prejudicial error." Noting the similarity of that language to language in the Administrative Procedure Act (APA), 5 U.S.C. § 706, the VA asserts that Congress

---

[4] That rationale overlooks the fact that one reason a veteran may have difficulty in the Veterans Court carrying the burden of proof on the issue of well-groundedness is that the VA failed to provide the congressionally mandated assistance in developing his claims while those claims were still before the department.

must have intended that § 7261(b)(2) be interpreted in the same manner as § 706 (the APA's prejudicial error rule) has been interpreted. According to the VA, § 706 "has long been understood to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial." Pet. Br. 8.

The flaw in the VA's argument is that there is no such uniform understanding of § 706. Rather, the very cases cited by the VA demonstrate that the federal appeals courts have adopted a wide variety of approaches to assigning the burden of proof. In general, when a claimant has demonstrated to a court that an administrative agency has committed an error during the course of contested proceedings, the court is more likely to relieve the claimant of any duty to demonstrate prejudice when the natural effect of the error is to prejudice the claimant's substantial rights. The Federal Circuit correctly determined that the natural effect of a § 5103(a) violation is to deprive veterans (who often proceed without counsel) of the ability to marshal the evidence necessary to demonstrate their entitlement to benefits. Indeed, Congress adopted the VCAA precisely because it believed that the § 5103(a) notification requirements were an important means of assisting veterans in putting together their cases. Under those circumstances, § 706 case law does not support the VA's contention that the rule of prejudicial error requires courts to impose on claimants the burden of proof on the issue of whether they were prejudiced by the VA's own errors. Nothing in either § 706 or § 7261(b)(2) cuts against the evidence that Congress – in adopting the VCAA – intended to impose on the VA the burden of demonstrating that its errors did not prejudice a

claimant.

ARGUMENT

I. THE VCAA IMPOSES THE BURDEN OF PROOF ON THE VA

A. The Overall Structure of the Statutory Scheme Governing VA Claims Indicates That the VA Bears the Burden of Establishing That Its Errors Did Not Prejudice the Claimants

There can be little disagreement about one essential point: no federal statute *directly* addresses the burden of proof issue raised in this case. The VCAA, adopted in 2000, sets forth detailed requirements regarding information that the VA must convey to all claimants for veterans benefits, 38 U.S.C. § 5103(a), but it is silent regarding the consequences if the VA denies the claim after having failed to convey the required information. Congress adopted rules in 1988 governing judicial review of decisions by the VA denying veterans benefits; one of those rules, 38 U.S.C. § 7261(b)(2), provides that the Veterans Court shall "take due account of the rule of prejudicial error." Section 7261(b)(2) suggests that the Veterans Court, when determining whether an error committed by the VA during the course of administrative proceedings requires reversal of an administrative action, should take into account the degree of prejudice suffered by a claimant as a result of the error. But the provision is silent regarding who bears the burden of proof on the issue of

prejudice. Indeed, the provision is written in the most general of terms and does not indicate whether it has any application whatsoever to cases in which the VA failed to provide required information to claimants.

In the absence of any statutory provision directly addressing the burden of proof issue, the Court looks for guidance to the overall structure of the statutory scheme governing VA benefits. A reviewing court should not "confine itself to examining a particular statutory provision in isolation," because "[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Such an examination in this instance confirms the Federal Circuit's conclusion that Congress intended to impose on the VA the burden of demonstrating that the claimant was not prejudiced by its failure to convey information that the VCAA requires be conveyed to all claimants.

Respondents Simmons and Sanders have both explained at length in their briefs why the overall structure of the statutory scheme governing VA benefits indicates that Congress intended to impose on the VA the burden of demonstrating that its VCAA violations did not prejudice the claimant. Simmons Br. 11-33; Sanders Br. 32-57. *Amici* will not repeat those arguments here. Rather, *amici* touch briefly on several points.

First, the entire veterans benefits system is structured so that at all stages of the proceedings, every benefit of the doubt is granted to veterans asserting claims for benefits. Congress has established a nonadversarial system "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). The VA openly acknowledges its "'obligation to provide complete assistance to the veteran or other claimant in the development of a claim.'" Pet. Br. 23 (quoting S. Rep. No. 418, 100th Cong., 2d Sess. at 32-33 (1988)). The solicitude for claimants continues even after a claim has moved from the VA into the Veterans Court: factual findings in the veteran's favor are not reviewable in judicial proceedings, 38 U.S.C. §§ 7252(a), 7261(a)(4), and the Veterans Court in its decision-making is directed to take "due account" of the rule that the VA give the "benefit of the doubt" to the veteran. 38 U.S.C. § 7261(b)(1). In light of those provisions, it would be anomalous to hold that even when the VA has been shown to have conducted flawed administrative proceedings (by failing to comply with VCAA notification requirements), the VA's denial of benefits can be upheld regardless whether the VA provides any evidence that its error did not prejudice the claimant.

Second, as Respondent Sanders points out, claims for veterans benefits are on-the-record proceedings. Sanders Br. 42-43 (citing 38 U.S.C. § 7252(b)). Although claimants are highly likely to be prejudiced if the VA fails to fulfill its VCAA § 5301(a) notification obligations, evidence of such prejudice (*e.g.*, steps the claimants might have taken had they been informed of requirements that additional medical evidence be

submitted) is unlikely to be part of the administrative record. Thus, imposing on claimants the burden of proving to the Veterans Court that they have suffered prejudice will likely foreclose many veterans from obtaining relief even when they have demonstrated wholesale violations of § 5103(a).

Third, the VA should not be permitted to minimize the importance of the § 5103(a) notification requirements in ensuring that claimants have a fair opportunity to fully develop their claims. In adopting the VCAA, Congress mandated that each element of § 5103(a) notification be made at the *outset* of proceedings, *before* the regional office has made any initial determination regarding whether benefits should be granted. As the Federal Circuit reasoned:

> In passing the VCAA, Congress clearly viewed the claimant's participation as essential to processing his or her claim for VA benefits, and believed that the claimant should be notified which evidence he or she was responsible for providing and which evidence the government was responsible for providing. If Congress felt that such notice elements were not necessary to allow the claimant to effectively participate in the processing of his or her claim, then why would it have required them as part of notice pursuant to § 5103(a)?

Pet. App. 17a-18a. The court said that it would be improper to "excuse" the VA's failure to provide these essential notifications "without a showing that the defect had not frustrated the very purpose of the notice." *Id.* 18a.

Finally, *amici* note that the VA does *not* claim that the evidentiary burden imposed on it by the Federal Circuit would be overly difficult to meet. The absence of such a claim is understandable: the requirements of § 5103(a) are relatively straightforward, and thus the VA should not have difficulty ensuring proper notification in the vast majority of cases. The problem to date has generally involved the VA's failure to provide *any notice at all.* Once VA personnel are fully trained regarding the requirements of § 5103(a), it should not be overly difficult for them to determine the VA's evidentiary requirements for each type of claim that regularly comes before the VA. Under those circumstances, the only circumstance (discounting human error) under which the VA's initial notification could be deemed inadequate would be the highly unusual case in which the VA stiffened its evidentiary requirements following the initial VCAA notification. Moreover, the Federal Circuit did not mandate remand in every case involving VCAA notification error, but rather only in those cases in which the VA could not demonstrate that the claimant was unaffected by its error – thereby giving "due account" to the rule of prejudicial error. Pet. App. 19a.

B. The Circumstances Surrounding Adoption of the VCAA Confirm That Congress Intended to Impose the Burden of Proof on the VA

If additional evidence were needed, the circumstances adoption of the VCAA in 2000 make crystal clear that Congress intended to place the burden of proof on the VA.

As the VA recognizes, the VCAA was adopted in response to a Veterans Court decision, *Morton v. West*, 12 Vet. App. 477 (1999). *See* Pet. Br. 20-21. *Morton* involved a veteran (Morton) who claimed a variety of service-connected disabilities. VA personnel who initially examined him determined that the claims were not well-grounded; based on that determination, the VA decided that it would not assist the veteran in developing his claim. Although a statute in effect at that time (38 U.S.C. § 5107(b) (1991)) arguably required the VA to provide assistance to all claimants, earlier decisions had held that the statute required no more than that assistance be provided to claimants whose claims were well-grounded.

The sole claim raised by Morton in his appeal to the Veterans Court was that the VA had erred in declining to assist in the development of his claim. Because Morton was foreclosed by earlier decisions from asserting a *statutory* right to assistance, he sought instead to rely on VA regulations that arguably created such a right. The VA *denied* that its regulations created a right to assistance among those who filed claims deemed not well-grounded by VA officials. The Veterans Court went one step further: it held that, in light of 38 U.S.C. § 5107(b) (1991), the VA was not even authorized to assist in the development of a claim determined by the VA not to be well-grounded. 12 Vet. App. at 485-86.

Congress passed the VCAA in response to the *Morton* decision, for the purpose of overturning it. *See Mayfield v. Nicholson*, 499 F.3d 1317, 1319 (Fed. Cir. 2007). But the VCAA was not simply a rebuke to the Veterans Court; it was also a rebuke to the VA, which

had insisted in *Morton* that it was not *required* to provide assistance to claimants whose claims were deemed not well-grounded. The VCAA now requires the VA to assist *all* disability claimants, even those veterans whose initial submissions are deemed not well-grounded by VA personnel. Among the assistance measures mandated by the VCAA were the § 5103(a) notification requirements.

By asserting that veterans whose claims have been denied bear the burden of demonstrating that they were prejudiced by the department's violation of § 5103(a), the VA is essentially seeking to reinstate *Morton* and resurrect the VA policy that Congress rebuked when it adopted the VCAA. That is so because, under the standards established by the Federal Circuit, a claimant is not deemed prejudiced by a § 5103(a) violation if it is determined that his claim was not well-grounded in law. Pet. App. 15 (listing a finding that "a benefit could not have been awarded as a matter of law" as one of three bases for determining that a claimant has not been prejudiced). Thus, if the VA has its way, a claimant will be denied recourse for a violation of his § 5103(a) notification rights unless he can affirmatively demonstrate that his claim was, indeed, well-grounded.[5] But that is precisely the holding of *Morton*, a holding that Congress repudiated when it adopted the VCAA. The VA successfully resisted Mr. Morton's assertion

---

[5] That rationale overlooks the fact that one reason a veteran may have difficulty in the Veterans Court carrying the burden of proof on the issue of well-groundedness is that the VA failed to provide the congressionally mandated assistance in developing his claims while those claims were still before the department.

that it should have helped him develop his claims by asserting that it was under no obligation to assist with the development of claims determined not to be well-grounded.

The VA even uses *Morton*'s precise rationale for excusing its failure to provide assistance: not providing such assistance allows it to conserve its resources for more deserving veterans. Pet. 25 (Remanding cases in which the VA has violated § 5103(a) "will divert resources from the adjudication of meritorious claims."). *Amici* respectfully submit that when Congress adopted the VCAA in 2000 to overrule *Morton*, it could not have intended to permit the VA to achieve the same result by reintroducing the discredited *Morton* rationale through the back door.

II. SECTION 7261(b)(2) DOES NOT SUPPORT THE VA BECAUSE THERE IS NO UNIFORM UNDERSTANDING REGARDING ALLOCATION OF THE BURDEN OF PROOF UNDER THE RULE OF PREJUDICIAL ERROR

In support of its position that claimants ought to bear the burden of proof on the issue of prejudice, the VA points to 38 U.S.C. § 7261(b)(2), which provides that the Veterans Court, in reviewing appeals from VA claims determinations, should "take due account of the rule of prejudicial error." Noting the similarity of that language to language in the Administrative Procedure Act (APA), 5 U.S.C. § 706, the VA asserts that Congress must have intended that § 7261(b)(2) be interpreted in the same manner as § 706 (the APA's prejudicial error

rule) has been interpreted. According to the VA, § 706 "has long been understood to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial." Pet. Br. 8.

The flaw in the VA's argument is that there is no such uniform understanding of § 706. Rather, the very cases cited by the VA demonstrate that the federal appeals courts have adopted a wide variety of approaches to assigning the burden of proof. Given that variety of approaches, there is no basis for the VA's assertion that Congress, when it adopted § 7261(b)(2), must have intended that provision to incorporate some such uniform understanding.

Numerous federal appellate coourts have been unwilling to impose on the party that has demonstrated significant administrative error the additional burden of demonstrating that it was prejudiced by the error. Instead, they have limited application of the doctrine of harmless error to cases in which the irrelevance of the error to the final administrative action is "clear." As the Veterans Court noted in *Mayfield*:

> There is also considerable APA § 706 caselaw to the effect that "the doctrine of harmless error . . . is to be used only 'when a mistake of the administrative body is one that clearly has no bearing on the procedure used or the substance of decision reached.'" *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (quoting *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 466 (D.C. Cir. 1967)); *accord Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444-45

(5th Cir. 2001); *McLouth Steel Prod. Corp. v. EPA*, 838 F.2d 1317, 1324-25 (D.C. Cir. 1988); *Buschman v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982); *Evans v. Sec'y of Defense*, 944 F. Supp. 25, 29 (D.D.C. 1996).

Mayfield, 19 Vet. App. at 114-15.

For example, in one of the cases relied on by the VA, *Friends of Iwo Jima v. National Capital Planning Comm'n*, 176 F.3d 768 (4th Cir. 1999), the plaintiffs cited two minor procedural errors (regarding the notice provided for two of many meetings) as the basis for overturning informal administrative action (a decision to site an Air Force memorial at a specific location) that followed a years-long administrative process. Given that the plaintiffs (who wanted the memorial sited elsewhere) had not participated in the administrative proceedings and thus would not have attended the two meetings even if the notice for those meetings had been proper, and given that the procedural requirements at issue played such a minor role in the overall administrative process leading to the eventual citing decision, the Fourth Circuit deemed it clear that the plaintiffs had not been prejudiced by the procedural errors. 176 F.3d at 774. It was within that context that the Fourth Circuit stated that the plaintiffs could not prevail unless they came forward with evidence that they had actually been prejudiced by the procedural errors. *Id.*[6]

---

[6] Other cases cited by the VA merely mentioned burden of proof issues in passing; who bore the burden of proof was not at issue in those cases. For example, the D.C. Circuit determined in *American Coke and Coal Chems. Inst. v. EPA*, 452 F.3d 930 (D.C.

When, as here, a party is not challenging informal agency action but rather is challenging an adjudicative decision reached after an on-the-record proceeding, there is much more reason to be concerned by an agency's failure to abide by procedural requirements that concededly were imposed by Congress for the very purpose of protecting a party to the adjudication. Whenever, as here, an "error is of such a character that its natural effect is to prejudice a litigant's substantial rights," courts have imposed on the party seeking to sustain a challenged decision the burden of demonstrating an absence of prejudice. *Kotteakos v. United States*, 328 U.S. 750, 760 (1946). This court has tended to impose on the challenger the burden of demonstrating that he has been prejudiced by errors committed below only when the errors were merely "technical" in nature. *O'Neal v. McAninch*, 513 U.S. 432, 439 (1995).

The VA concedes the existence of numerous appeals court decisions in which the court did not impose on the challenger any burden of demonstrating prejudice. *See, e.g.*, Pet. Br. 16 n.4 (citing *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003)). But the VA attempts to distinguish those cases by asserting that "they stand for the proposition that denial of [certain procedural] rights is prejudicial even if there is no evidence of an effect on the outcome of the proceeding." *Id.* The VA asserts that "[t]hat proposition has no application here, since there is no dispute that a VCAA

Cir. 2006), that the EPA had adopted challenged rules in accord with all procedural requirements, and thus it had no occasion to consider whether those challenging the rules had been prejudiced by any errors committed in connection with their adoption.

notice error is prejudicial only if it has some effect on the determination of benefits." *Id.*

The VA's effort to distinguish *Sprint* and similar cases is unavailing. They illustrate that all § 706 cases exist on a continuum, with courts demanding that a challenging party provide less and less evidence of prejudice the more it appears that the "natural effect" of an administrative error is to cause prejudice. Cases such as *Sprint* are not different in kind from Respondents' claims; rather, they involve errors whose natural tendency to cause prejudice is sufficiently large that they create an irrebutable presumption of prejudice. *See also Chamber of Commerce of the United States v. SEC,* 443 F.3d 890, 904 (D.C. Cir. 2006); *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002); *McLouth Steel Prods.*, 838 F.2d at 1324. When, as here, the agency's error has a strong natural tendency to cause prejudice but the tendency is not quite as strong as in case such as *Sprint*, it is appropriate to presume prejudice but to provide the agency with an opportunity to rebut that presumption.

Because there is no uniform understanding that the rule of prejudicial error imposes on the party alleging error the burden of proving prejudice, there is no reason to conclude that Congress adopted that understanding when it adopted 38 U.S.C. § 7261(b)(2). Accordingly, § 7261(b)(2) does not overcome the evidence (cited above) indicating that Congress intended, when it adopted the VCAA, to impose on the VA the burden of demonstrating that its failure to provide § 5103(a) notification to a claimant did not prejudice the claimant's rights. The VCAA did not overrule § 7261(b)(2); rather, it addressed a topic

(burden of proof) that simply was not a focus of the earlier statute.

Amici also note that affirming the decision below should have minimal impact on the administrative process. This is not an instance in which overturning administrative action will prevent the government from implementing a program that has been years in the planning. Nor is it an instance in which a decision adverse to the government will require it to pay out funds to a claimant. All the Federal Circuit has done is to require the VA to take another look at a relatively small number of cases. Given that in each of those cases the VA has failed to follow its statutory mandate and the claimants are veterans (a group that Congress has made clear is entitled to special protections), it is not asking too much to request that the VA take such second looks.

CONCLUSION

Amici curiae respectfully request that the Court affirm the decision of the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: October 21, 2008

Counsel wish to thank DeShun Harris, a student at Texas Tech University Law School, for her assistance in preparing this brief.